THE

MADRAS LAW JOURNAL.

VOL.] AUGUST, 1929 [LVII

NOTES OF RECENT CASES.

Wallace and Walsh, JJ. C.M.P. No. 763 of 1928.
17th July, 1929.

Civil Procedure Code, O. 22, R. 6—Civil Revision Petition—Death of respondent a few days prior to the judgment—Legal representative not brought on record for judgment—Validity of the judgment.

Where in a Civil Revision Petition the respondent died a few days before the hearing and his legal representatives were not brought on record at or before the hearing, but judgment was pronounced allowing the revision petition with the name of the deceased respondent on the record,

Held, that the judgment was invalid and the Civil Revision Petition must be reheard after bringing on record the legal representatives on an application filed by the petitioner within time.

T. S. Ramaswami Aiyar for Petitioner.

S. Rangaswami for Respondent.

N.S.

Anantakrishna Aiyar, J. S.R. No. 18336 of 1928.
18th July, 1929.

Court Fees Act, Art. 17, *cl.* (*b*) (2)—*Distress under Madras Estates Land Act—Suit for declaration that distress illegal on the ground that the rent claimed was more than that legally due—Dismissal of suit—Appellate Court allowing restraint for a smaller amount of rent—Second Appeal by landlord—Memo. of Objections by ryots—Court-fee payable.*

Certain ryots instituted a suit against the landlord under S. 95 of the Madras Estates Land Act for a declaration that the distress levied by the landlord is not legal as no notice of demand of rent was given to them and the amount of rent that was claimed was not

legally due. The suit was dismissed and on appeal the Appellate Court held that the proper amount was a smaller amount and that distress to that extent alone was legal. The landlord preferred a second appeal to the High Court and the ryots put in a Memo. of Objections to the effect that the rent as fixed by the Lower Appellate Court was not a proper rent but only a smaller sum was due. The Memo. of Objections did not raise any general question as to the illegality of the distress *in toto* on the ground of want of notice or some other defect.

Held, that the subject-matter of the Memo. of Objections was not incapable of valuation within the meaning of Art. 17 (*b*) (2) of the Court Fees Act.

P. Satyanarayana Rao for Ryots.

The Government Pleader (*P. Venkataramana Rao*) for the Crown.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. *18th July,* 1929.

L.P.A. No. 291 of 1927.

Transfer of Property Act, Ss. 95 *and* 101—*Redemption of mortgage by a person interested in the property—Equitable subrogation—Presumption of keeping alive the mortgage.*

Sec. 95 of the Transfer of Property Act does not stand in the way of the application of the equitable doctrine of subrogation, where a mortgage is discharged by a person interested in the property and not by a co-mortgagor.

There is a presumption that the person who pays the money in discharge of a mortgage intends to keep it alive.

T. R. Ramachandra Aiyar with *B. Sitarama Rao, K. Kuttikrishna Menon* and *K. P. Krishna Menon* for Appellants.

P. Govinda Menon for Respondent.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. *19th July,* 1929.

C.R.P. No. 876 of 1928.

Limitation Act, Art. 182 (5)—*Step-in-aid of execution—Application for leave to bid and to set off the price against the decree amount.*

An application put in by the decree-holder praying for leave to bid and to set off the price against the decree amount due to him is a step-in-aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act.

Per Venkatasubba Rao, J.—An application by the decree-holder for leave to bid at the execution sale is a step-in-aid of execution.

45 Mad. 466 referred to.

Dr. V. K. John and *S. Panchapakesa Sastri* for Petitioner.

Respondent unrepresented.

N.S.

Anantakrishna Aiyar, J. S.A. No. 626 of 1928.
22nd July, 1929.

Hindu Law—Widow—Foreclosure decree against—Suit for declaration by reversioner that decree was fraudulently obtained—Decision in favour of plaintiff—Form of decree.

Where, in a suit instituted by a reversioner for a declaration that a foreclosure decree obtained against a Hindu widow has been fraudulently obtained and hence not binding on the reversion, the Court comes to a decision in favour of the plaintiff, the proper decree that must be passed is to declare that the foreclosure decree is not binding upon the plaintiff or any other person who happens to be the reversioner and that the plaintiff or the person entitled to the reversion would be entitled to redeem the property on the death of the widow on payment of the mortgage amount together with the value of any improvements, if any, effected by the mortgagee.

S. Narayana Aiyangar for Appellant.

Watrap S. Subramania Aiyar for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. Nos. 260 to 291 of 1926.
23rd July, 1929.

Madras Estates Land Act, S. 3, *cl.* (5) *and S.* 52, *cl.* (3)*—Patta by lessee from landlord—If binding for subsequent faslis.*

Where a patta has been tendered for a certain fasli by a lessee from the landlord for a term of years, it governs the relations between the landlord and the ryot for subsequent faslis also.

K. V. Sesha Aiyangar and *S. Anantharama Aiyar* for Appellant.

M. S. Venkatarama Aiyar and *E. Krishna Aiyar* for Respondents.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 431 of 1927.
23rd July, 1929.

Mortgage—Redemption—Suit for—Onus of proof—Admission of plaintiff's title by defendant—Effect.

Where in a suit for redemption of a mortgage, the plaintiff alleged that the mortgage deed was destroyed and produced a plain copy of it, and the defendant admitted the title of the plaintiff,

Held, that it was for the plaintiff to prove that the terms of the mortgage were substantially the same as those alleged in the plaint and that the suit was within time, and that the onus was not shifted by the admission of the plaintiff's title by the defendant.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

N.S.

Curgenven, J. C.M.Ps. Nos. 2412 and 2517 of 1929.
24th July, 1929.

Civil Procedure Code, O. 39, *R.* 1—*Application for leave to sue in* forma pauperis—*If a "suit"—Power of Court to grant* ad interim *injunction.*

A petition for leave to sue in *forma pauperis* is not a "suit" within the meaning of O. 39, R. 1, Civil Procedure Code till it is admitted and, consequently, the Court has no power to grant an order of *ad interim* injunction before it is admitted.

V. Pattabhirama Sastri for Petitioner.

G. Sivaramakrishna Sastri for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. Nos. 323 and 344 of 1922.
26th July, 1929.

Hindu Law—Partition—Alienee from a coparcener—Compromise of suit—Alienee not a party to compromise—If bound by the compromise.

In a partition action, where besides the members of the joint family, the alienees of some items from one of the coparceners were parties, any compromise come to between the coparceners without having regard to the equities of the alienees, will not bind the alienees and the said suit will have to proceed to work out the alienees' equity to have the alienated items set apart for the alienor's share if possible.

V. K. Srinivasa Aiyangar for Appellant.

T. R. Venkatrama Sastriar, T. S. Ramaswami Aiyar and *M. S. Vaidyanatha Aiyar* for Respondent.

S.V.V.

Venkatasubba Rao, J.
19*th April*, 1929.

C.M.S.A. No. 34 of 1925
and
C.R.P. No. 544 of 1925.

Civil Procedure Code, S. 48 *and O.* 21, *R.* 10—*Application for transfer of decree filed within* 12 *years of the date of the decree—Simultaneous application for execution in the transferee Court—Dismissal of the latter application—Application for execution subsequent to the receipt of the decree but more than* 12 *years from date of decree—Whether maintainable.*

A petition was filed in the Court which passed the decree to transfer it to another Court for execution just before the expiry of 12 years from the date of the decree. Simultaneously a petition was filed in the transferee Court for execution of the decree of this petition was dismissed. After the decree was transferred, a fresh petition was put in the transferee Court to revive the original application for execution which had been dismissed but when this petition was put in, twelve years had elapsed from the date of the decree.

Held, that the application for transfer of the decree was not an application for execution within the meaning of O. 21, R. 10 of the Civil Procedure Code and that, an execution petition in the transferee Court not having been filed subsequent to the receipt of the decree by that Court and within 12 years of the date of the decree, the decree because barred by reason of section 48 of the Civil Procedure Code.

20 A. 78: 16 C. 744: 35 B. 103: 48 A. 121 referred to.

Subba Rao for *P. Venkataramana Rao* for Appellant.

M. Ramachandra Rao for Respondent.

N.S.

Venkatasubba Rao and
Madhavan Nair, JJ.
17*th July*, 1929.

C.M.A. No. 366 of 1926.

Lease—Deposit—Provision for adjustment of the amount in the last year's rent—Absence of clause of forfeiture —Deposit whether can be forfeited.

Where a lease deed provided that a sum of money which was paid at the time of the deed was to be adjusted towards the rent of the last year of the lease and that, in case of default committed by the lessee, the lessor had the right to re-enter and take possession of the properties with the standing crops thereon, but contained no clause of forfeiture.

Held, that, the amount paid, though it was called a deposit, was not so in the legal sense.

N R C

27 Ch. D. 89: 1909 A.C. 571 referred to.

K. V. Sesha Aiyangar for Appellant.

T. S. Venkatesa Aiyar for Respondent.

N.S.

Venkatasubba Rao and
Madhavan Nair, JJ.
24th July, 1929.

S.A. No. 409 of 1925.

Hindu Law—Succession—Bhandhus—Ex parte materna—*Propinquity and spiritual benefit—Priority.*

Among two persons claiming to succeed to the properties of a Hindu as being his bandhus, the person who is nearer to the deceased in degree or in propinquity or affinity succeeds in preference to the other, although the latter may confer more spiritual benefit on the deceased than the former. The doctrine of spiritual benefit can be applied only in cases where the two claimants are related to the deceased in equal degree.

B. Somayya for Appellant.

V. Govindarajachari for Respondent.

N.S.

Venkatasubba Rao and
Madhavan Nair, JJ.
24th July, 1929.

C.M.A. No. 333 of 1927.

Insurance policy—Policy issued before Act XIII of 1923—*Policy expressed to be for benefit of wife and children—Applicability of section* 6 *of Married Women's Property Act.*

Act XIII of 1923 does not deal with the question of the applicability of the Married Women's Property Act to life insurance policies before 1913 but an insurance policy which was taken in 1894 and expressed to be for the benefit of the wife and children of the assured is subject to the provisions of the Married Women's Property Act and consequently a trust is created in favour of his wife and children.

37 M. 483 (F.B.) followed.

V. Govindarajachari for Appellant.

B. Jagannadha Das for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 328 of 1924.
26th July, 1929.

Vendor and purchaser—Sale-deed executed but not registered in time—Vendee put in possession—Promise by vendor to execute a fresh sale-deed and register—Specific performance of—Suit for possession by vendor—Part-performance if can be relied on.

A vendor executed a sale-deed and put the vendee in possession of the properties. The sale-deed was not registered within four months. The vendor thereupon agreed to execute a fresh sale-deed but later failed to do so. The vendee thereupon brought a suit for specific performance and execution of the sale-deed. The vendor also brought a suit for recovery of possession to which the vendee relied on his possession as amounting to part-performance of the contract.

Held, from the promise to execute a fresh sale-deed, the Court could presume that the vendor admitted the failure to register to be due to his own fault and decreed specific performance as there was an undertaking to execute a fresh sale-deed. The vendee can rely on his possession as part-performance in defence to the suit for possession.

16 Mad. 341: 43 Mad. 822: 6 M.L.J. 263 distinguished.

Quaere: If the decision in A.S. No. 281 of 1925 (55 M.L.J. S.N. No. 45) is correct.

Ch. Raghava Rao for Appellant.

The Advocate-General and *P. Satyanarayana Rao* for Respondents.

S.V.V.

Ramesam and Jackson, JJ. A.S. No. 96 of 1928.
29th July, 1929.

Contract Act, S. 74—Penalty—Compound interest at enhanced rate on default—Compensation.

Where a mortgage bond contained a stipulation for payment of simple interest at 10½ per cent. per annum and in default compound interest at 13½ per cent. per annum, the proper compensation to be awarded is compound interest at the original rate instead of simple interest at the enhanced rate.

26 M. 111 dissented from.

34 C. 150 (P.C.) explained.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for Appellant.

K. V. Sesha Aiyangar and *T. R. Ramachandram* for Respondent.

N.S.

NRC

Anantakrishna Aiyar, J. S.A. No. 1917 of 1927.
30th July, 1929.

Civil Procedure Code, O. 23, R. 1, cl. (3)—"Subject-matter" and "claim"—Meaning of—Prior suit against defendant as trustee —Second suit as trespasser—Properties same—Second suit if barred under O. 23, R. 1, cl. (3).

A former suit for possession of the properties and for an account on the basis of the defendant being a trustee was withdrawn without leave of Court on the defendant's plea that he was not a trustee. A second suit was brought for the recovery of the same immovable properties on the basis of the defendant being a trespasser.

Held, that the claim was once on basis of a will and next as heir, then the claim in both the suits being as owner, it may be said to be in respect of the same subject-matter as the defendant is no more concerned with any one source of plaintiff's title than with another.

But in this case, the main allegations, the causes of action and the reliefs claimed being substantially different in the two suits, the second suit is not barred by O. 23, R. 1, Civil Procedure Code.

39 M. 987 (F.B.) relied on.

M. Patanjali Sastri for Appellant.

K. Bhashyam Aiyangar for Respondent.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 423 of 1924.
1st August, 1929.

Civil Procedure Code, O. 33—Suit filed by paying Court-fee —Court-fee declared insufficient—Incapacity to pay the additional Court-fee—Petition to continue suit as a pauper—If must be presented in person and in the form prescribed by R. 3.

Rules 2 and 3 of O. 33, Civil Procedure Code, only contemplate cases where permission to file the suit as a pauper is asked for and do not apply to a case, where in a suit already filed by paying a Court-fee, the plaintiff seeks permission to continue the suit as a pauper on the ground that he is not able to pay the additional Court-fee required by the Court. The Court in the exercise of its inherent power can permit the continuance of the suit as a pauper but in so doing will follow as far as possible the procedure laid down in O. 33 and issue notice to the Government regarding pauperism.

38 M.L.J. 146 applied.

C. Rama Rao for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Ramesam and Jackson, JJ. Appeal No. 132 of 1927.
2nd August, 1929.

Evidence (Amendment) Act (XXXI of 1926)*—If retrospective —Co-mortgagors—Acknowledgment by some only—If saves limitation against the rest—Limitation Act, Ss.* 19, 20 *and* 21*— Construction—"Duly authorised"—"Chargeable"—Meaning of—"Co-contractors," if includes co-mortgagors.*

Where in a suit on a mortgage bond an endorsement of payment of interest by two out of the three co-mortgagors was relied on as saving limitation against all the three, and where it was contended that the mortgage was not duly proved under section 68 of the Evidence Act though the execution was not specifically denied in the written statement

Held, (1) that the mortgage was proved inasmuch as the Amending Act XXXI of 1926 amending S. 68 of the Indian Evidence Act is retrospective since it does not affect any substantial right; (2) that the acknowledgment and payment of interest by two co-mortgagors would not save limitation as against the third; and (3) that mere residence in the house looking after the lands and paying kist would not clothe a stranger with authority to acknowledge liability to save limitation against a mortgagor without specific authority on that behalf.

3 L.W. 231 followed.

Co-contractor includes co-mortgagor.

25 Mad. 220 and 55 I.C. 763 followed.

Held further, that there is no distinction between acknowledgment in writing and payment of interest (Ss. 19 and 20 of the Limitation Act) so far as S. 21 of the Limitation Act applies to them. There being no corresponding provision in English Law to S. 21 of the Limitation Act, English case-law would not apply.

11 H.L.C. 115, 11 A.C. 639, 37 Ch. D. 651 distinguished.

"Charge" in S. 21, Limitation Act, connotes not only personal liability but also liability of property.

K. Balasubramania Aiyar and *K. Venguswami Aiyar* for Appellants.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar and *R. Sriramachariar* for Respondent.

P.R.N.

Curgenven, J. Cr.R.C. No. 267 of 1929.
2nd August, 1929.

Arms Act, Ss. 10 *and* 19 (*b*)*—Accused not the consignor of firearms—If can be convicted—Criminal Procedure Code, S.* 234*—Receipt of firearms on four different dates and export of the same—Joinder of charges—Legality.*

N R C

A person who is not a consignor of firearms cannot be convicted under sections 10 and 19 (*b*) of the Arms Act.

A joinder of charges for the offence of receiving firearms on four different dates and exporting the same is illegal under section 234 of the Criminal Procedure Code.

Dr. V. K. John for Accused.

K. N. Ganapathi for *The Public Prosecutor* for the Crown.

N.S.

Kumaraswami Sastri and Walsh, JJ. C.M.A. No. 448 of 1927.
7th August, 1929.

Res judicata—*Execution proceedings—Sale proclamation giving a larger amount than due under the decree—Non-objection to—Leave to bid application—Counter therein objecting to the amount—Objection overruled—Leave granted—If impliedly* res judicata.

A razinama decree in a mortgage suit contained a provision for payment of interest but there was no such provision in the personal decree passed later on. In an execution application put in for attachment and sale of the immoveable properties of the judgment-debtors and in the sale proclamation the amount of the decree with interest had been claimed. When the decree-holder applied for leave to bid, the debtor filed a counter containing allegations to the effect that the amount shown was too much. The objections were overruled as mere objections to sale proclamation and late. In the subsequent execution application, the question arose if (*i*) the non-objection to the inclusion of interest in the sale proclamation, and (*ii*) the order of the Court on leave to bid application operated as *res judicata.*

Held, the first contention would imply that the decree itself was superseded by orders in execution which allow more than what the decree granted. Where a property is liable for attachment and sale and is sold, an objection can be raised in subsequent execution proceedings that the amount shown in the previous execution application was not correct.

37 All. 589, 44 All. 159, 1 Pat. 593 referred.

Also an order giving or refusing leave to bid being only a ministerial and non-appealable order, it cannot operate as *res judicata.*

38 Cal. 712 (P.C.) applied.

S. Varadachariar and *A. Swaminatha Aiyar* for Appellant.

S. Ramaswami Aiyar and *R. Krishnaswami Aiyangar* for Respondent.

S.V.V.

Curgenven, J. C.M.P. No. 1662 of 1929.
7th August, 1929.

Receiver—Appeal in a mortgage suit—Allegation that respondent was a poor man and not personally liable—Property insufficient

—Difficulty to realise mesne profits—No allegation of waste—If receiver can be appointed.

The allegation that the party actually in possession of the property was a poor man who cannot be personally sued for mesne profits and the decree may prove difficult of realisation is not an adequate reason for the appointment of a receiver. It would be otherwise of course if there were a well-founded fear that some irreparable mischief might be caused to the corpus of the property.

43 All. 311 followed.

Watrap S. Subramania Aiyar for Petitioner.

S.V.V.

Ramesam and Jackson, JJ. C.R.P. No. 1602 of 1928.
9th August, 1929.

District Municipalities Act—Electoral roll—Wilfully procuring an improper entry therein—Offence under S. 52—If Court can enquire into—Finality of the roll.

Though an electoral roll is final in the sense that the right of the voters wrongly put in the roll to vote cannot be impeached and their votes may be counted, it does not preclude the Court from enquiring into the question whether an offence has been committed under sections 52 to 55 of the District Municipalities Act. The cases under the Legislative Council Rules stand on a different footing, there being no section corresponding to S. 52.

54 M.L.J. 269 followed.

V. Ramadoss and *R. Purushotham Aiyangar* for Petitioner.

T. R. Venkatrama Sastriar and *M. S. Vaidyanatha Aiyar* for Respondents.

S.V.V.

Waller and Cornish, JJ. C.M.A. No. 368 of 1928.
9th August, 1929.

Guardian and Wards Act, S. 25—Petition by father for custody of his child—Maintainability—Conditional order appointing father as guardian—Validity.

Section 25 of the Guardian and Wards Act is applicable to the case of a petition by the father for the custody of his child, even though the child did not live with him at any time.

An order appointing the father as guardian of the property of his son conditionally upon his furnishing security is invalid.

49 M. 809 relied on.

C. Rama Rao for Appellant.

P. V. Vallabacharlu for Respondent.

N.S.

Sundaram Chetty, J. S.A. No. 1782 of 1925.
9th August, 1929.

Civil Procedure Code, O. 21, R. 63—Claim Petition dismissed as being too late—Suit by decree-holder challenging the sale-deed in favour of claimant as fictitious and fraudulent—Onus of proof—Civil Procedure Code, S. 100—Finding of fact—Wrong view as to onus of proof—Interference by High Court.

When a claim petition is dismissed without investigation and a suit is thereafter instituted by the defeated claimant under O. 21, R. 63, Civil Procedure Code, for a declaration of his right under his sale-deed, the onus of proving the fictitious or fraudulent nature of the transaction lies heavily upon the attaching decree-holder.

I.L.R. 5 Rang. 852 (P.C.) followed.

A.I.R. 1928 Mad. 1259 distinguished.

I.L.R. 7 Pat. 777 applied.

Distinction between claims dismissed after investigation on the merits, and claims dismissed as being too late, pointed out.

When a finding of fact by the Lower Appellate Court is vitiated by a wrong view of law on the question of onus of proof, the High Court will interfere and set aside that finding.

S. Nataraja Nadar for Appellant.

S. Narayana Aiyangar for Respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 237 of 1926.
12th August, 1929.

Execution sale—Decree against Hindu father—Sale of joint family properties in execution—Quantum of intent that passes.

In a case where joint family properties are sold in execution of a decree against the father alone, if the sale certificate is ambiguous, the sons' shares also must be taken to have been sold unless it is shown specifically that the sons' shares were not put up for sale by a reference to the execution proceedings which culminated in the sale.

C. Padmanabha Aiyangar and *T. D. Srinivasachari* for Appellant.

S. T. Srinivasagopalachari and *P. K. Janakiram* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 637 of 1925.
15th August, 1929.

Limitation Act (IX of 1908), Art. 181—Mortgage by one of two undivided brothers—Suit against both brothers—Decree against executant's share—Sale of entire property in execution—Symbolical delivery—Subsequent ousting of the other brother from possession—Application by latter for possession—Limitation.

Where, in a suit on a mortgage executed by one of two undivided brothers against both of them, a decree was passed directing the sale of the mortgagor's interest alone in the property but the decree-holder brought the entire property to sale, purchased it and took symbolical delivery of the same as it was in the possession of the tenants, and subsequently the other brother whose share was not directed to be sold by the decree was dispossessed by the decree-holder purchaser and he filed an application to recover possession of it,

Held, that the sale of the entire property in execution of the decree was a nullity and it was not incumbent on the applicant who was in possession to set aside such a sale, and that the cause of action to recover possession arose to the applicant only when he was actually ousted and not on the date of the sale.

S. A. Seshadri for appellant.

T. L. Venkatrama Aiyar for respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 614 of 1928.
15th August, 1929.

Malabar Compensation for Tenants' Improvements Act—Applicability to roadside poramboke lands.

The Malabar Compensation for Tenants' Improvements Act is applicable only to cases of agricultural land or building site and does not apply to roadside poramboke land.

50 M. 813 followed.

M. C. Stridharan for appellant.

V. P. Karunakaran Nambiar for respondent.

N.S.

Ramesam and Jackson, JJ. A.S. No. 95 of 1925.
16th August, 1929.

Mortgage—Mortgagor's interest vested in Official Assignee—Mortgagor denying execution and consideration—Execution proved—Deed containing recitals of consideration—Onus probandi.

Where the execution of a mortgage deed is duly proved, and the deed contains recitals as to consideration, the onus lies on the person denying consideration to prove that they are false and that, in fact, no consideration passed. This rule is applicable as much against the mortgagor as against his heirs and other successors-in-interest by purchase or otherwise, and more so when the mortgagee is also dead and his legal representatives seek to enforce it.

36 All. 478 followed.

Spencer, J.'s decision in *Kumarappan Chettiar* v. *Narayanan Chettiar,* (1915) 35 I.C. 455 disapproved.

Case-law reviewed.

Watrap S. Subramania Aiyar for appellant.

K. Bhashyam and *V. C. Vceraraghavan* for respondent.

S.V.V.

Sundaram Chetty, J. S A. No. 1776 of 1925.
16th August, 1929.

Agent—Executing a mortgage for larger amount than authorised—Principal appraised of it—Non-objection to the same—If implied ratification.

Where an agent does an act exceeding his authority and the principal on being appraised of the fact fails to communicate to the agent his determination not to be bound by it within a reasonable time, it must be presumed that there was implied ratification.

9 L.W. 251 and 29 M.L.J. 551 followed.

10 Bom. H.C.R. 319 distinguished.

T.M. Krishnaswami Aiyar and *K. S. Desikan* for appellant.

S. Varadachariar and *V. Balasundaram* for respondents.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1247 of 1927.
16th August, 1929.

Evidence Act, S. 92—Evidence of facts surrounding the transaction—Admissibility of—Registration—Document undertaking to sell to any person to whom A might ask him to sell and deliver possession—If compulsorily registrable—In pari delicto *doctrine—If applicable when and not carried out.*

Where properties said to be worth Rs. 25,000 were sold for Rs. 2,000 by Ex. A and at the same time another document Ex. I was executed by which the vendee undertook to reconvey the properties to any person to whom the (vendor) might ask him to sell and deliver possession,

Held, though oral evidence of the intention of the parties was inadmissible to prove the nominal nature of the transaction, yet S. 92 did not fetter the Court's power to find the true nature of the documents in the light of all the circumstances surrounding the transaction.

47 M. 729 and 3 R. 106: 48 M.L.J. 339 (P.C.) applied.

As *expacie* there is no interest created in land under Ex. I it need not be registered.

23 L.W. 19 followed.

Regarding the plea that it was in fraud of creditors, *held,* that if the purpose of the fraud had not been effected there was no thing to prevent a plaintiff from repudiating the transaction as being benami.

24 L.W. 500 not followed on the ground that 35 C. 551 (P.C.) was not referred to therein.

S. Varadachariar and *V. Viyyanna* for appellant.

The Advocate-General and *V. Suryanarayana* for respondents.

S.V.V.

Venkatasubba Rao and *Madhavan Nair, JJ.* — C.M.A. No. 432 of 1927.

21st August, 1929.

Civil Procedure Code, O 20, R. 12—Mesne profits—Direction in decree to determine profits in execution—Validity of—Executing Court if can go into the regularity of the decree—Plaint and decree silent as regards future profits—Future profits if can be ordered in execution.

Under the Civil Procedure Code of 1908 mesne profits have to be determined in the suit itself under O. 20, Rule 12, but if a Court directs it to be determined in execution, it is only an irregular exercise of jurisdiction and the executing court cannot go behind the decree to which it is bound to give effect in execution.

31 Bom. L.R. 400 followed.

37 I.C. 997 dissented from.

Where the plaint was silent as regards future mesne profits and the decree merely granted mesne profits without negativing future mesne profits, the Court must be deemed to have meant that he should receive mesne profits down to the date of the delivery of possession, for the Court can award subsequent profits under O. 20, Rule 12 without a prayer for the same.

12 W.R. 75, 8 I.A. 197 and 53 C. 992 followed.

T. Rangachariar, V. Govindarajachari and *B. V. Ramanarasu* for appellant.

G. Lakshmanna and *Y. Suryanarayana* for respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 33 of 1926.
29th August, 1929.

Promissory note—Consideration—Past cohabitation—If a good consideration—S. 23 of Contract Act.

Where a promissory note was executed in consideration of past cohabitation with a dancing girl,

Held, the consideration being immoral under S. 23 of the Contract Act the suit on the pronote must fail and for this purpose it does not make any difference whether the connection is adulterous or not. The test to be applied for deciding if consideration is immoral is not whether it is a past transaction or one in future contemplation. Immoral consideration under S. 23 is not the same as absence of consideration.

44 Bom. 542 and 25 Bom. L.R. 252 followed.

13 M.L.J. 7 doubted and distinguished.

K. V. Srinivasa Aiyar for appellants.

Respondent did not appear.

S.V.V.

Sundaram Chetty, J. S.A. No. 2073 of 1927.
30th August, 1929.

Contract Act (IX of 1872), S. 38—Sale of goods—Goods delivered—Purchase money claimed with interest—Right to interest disputed—Interest not a term of the contract—If purchaser bound to accept goods.

In a contract for the sale of goods, the seller claimed interest on the purchase money as payable under the contract but as the buyer disputed liability to interest the seller sent the goods to the buyer with a letter reserving his right to interest.

Held, the buyer was not bound to accept the goods with the question of interest outstanding. It being found that interest was not a term of the contract, the offer cannot be said to be an unconditional offer under S. 38, Contract Act.

Cases of debtor and creditor may stand on a different footing.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for appellants.

S. T. Srinivasagopalachariar for respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 367 of 1928.
21st August, 1929.

Civil Procedure Code, S. 39 and Order 21, Rule 64—Decree passed by High Court—Transfer to Vellore Court for execution—Attachment by that Court—Subsequent transfer of territorial jurisdiction to Chittoor Court—Jurisdiction of latter Court to sell without a fresh attachment.

A money decree passed by the High Court on its original side was transferred to the sub-Court of Vellore for execution and properties of the judgment-debtor were attached by the Vellore Court. Subsequently, the territorial jurisdiction was transferred from the Vellore Court to the sub-Court of Chittoor. The decree-holder applied to the Vellore Court to return the decree back to the High Court and he then applied to the High Court to transfer the decree to the Chittoor Court. After the transfer, he applied to the Chittoor Court for sale of properties. Objection was raised that the Chittoor Court had no jurisdiction to sell without attaching the properties over again on the ground that the attachment effected by the Vellore Court ceased with the extinction of its territorial jurisdiction.

Held that, as the Vellore Court would be entitled to entertain applications in execution even after the transfer of jurisdiction and, the attachment effected by it did not terminate on the transfer of jurisdiction and that, therefore, the Chittoor Court was competent to order sale of the properties without a fresh attachment.

Held also, that the provisions of Order 21, Rule 64 of the Civil Procedure Code are not exhaustive of all the cases relating to sale of property by Court.

D. Ramaswami Aiyangar for *C. S. Venkatachari* for Appellant.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Respondent.

N.S.

Kumaraswami Sastri and Walsh, JJ. C.M.Ps. Nos. 1194, 1259 and 2016 of 1929.
23rd August, 1929.

Consolidation—Appeal and revision—Power of Court.

The following question has been referred to a Full Bench:—Whether the Court has inherent jurisdiction to consolidate appeals preferred against one judgment which will result in Court-fee being payable on the consolidated value of all the appeals and one vakalat being filed in all the appeals, and to consolidate Civil Revision Petitions for purposes of vakalat and process fee.

N R C

T. M. Krishnaswami Aiyar for *Advocate-General, M. Venkatasubbiah, K. Bhashyam Aiyangar* and *R. Sundaralingam* for Petitioners.

The Government Pleader for the Crown.

N.S.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 237 of 1929.
23rd August, 1929.

Indian Companies Act, Ss. 3 (3), 199, 200 *and* 201—*Order of High Court directing payment of unpaid share moneys to the liquidator by the share-holders—Executability of the Order by the District Court in the mofussil—Objection to the jurisdiction of the mofussil Court taken early—Effect.*

The Court contemplated by section 200 of the Indian Companies Act is the Court which would have jurisdiction if the registered office of the company were within the jurisdiction of that Court and consequently, in the case of an order passed by the High Court of Madras the Court contemplated by section 200 is not the District Court of any mofussil station but only the High Court as no other Court except the High Court has been constituted competent to deal with company matters in the Madras Presidency. Therefore, an order of the High Court of Madras, directing payment of unpaid share moneys by a share-holder to the liquidator of a company cannot be executed by a mofussil Court.

The provisions of section 3 (3) of the Act are not applicable where the objection to the jurisdiction of the Court was taken at the very outset.

N. Suryanarayana for Appellant.

C. S. Venkatachari for Respondent.

N.S.

Ananthakrishna Aiyar, J. S.A. No. 10 of 1926.
27th August, 1929.

Civil Procedure Code, S. 73—*Amount realised by Receiver appointed in execution proceedings—If liable to rateable distribution.*

A Receiver appointed in execution proceedings is not the agent of the decree-holder and moneys realised by him are not moneys of that decree-holder. Consequently, moneys realised by him are liable to rateable distribution under section 73 of the Civil Procedure Code.

K. Bhashyam Aiyangar for Appellant.

K. V. Ramachandra Aiyar and *N. S. Srinivasa Aiyar* for Respondent.

N.S.

Sundaram Chetty, J. S.A. Nos. 77 and 78 of 1926.
2nd September, 1929.

Company—Prospectus—Board of directors notified—Personnel charged by two directors retiring before allotment—Retirement not notified to applicants—Duty of promoters—Applicant if can rescind allotment and claim a refund.

Where relying on the personnel of the directors as notified in the prospectus, a person applied for shares and paid for them, but before the allotment the directorate had changed by two of the directors relating and that fact was not notified to the applicant,

Held, that, it was the duty of the promoters to communicate to the applicants the change in the directorate and ask them if they would adhere to their original offer or withdraw it; and if an application is made on the faith of a statement which is true when made but untrue when the shares are allotted, the applicants are entitled to rescind the offer.

17 Ch.D. 373 and 95 L.T. 756 followed.

G. Lakshmanna for Appellants.

Respondents not represented.

S.V.V.

Ramesam and Jackson JJ. A.S. No. 118 and 119 of 1927.
2nd September, 1929.

Land Acquisition—Market value of land—Special value by reason of views of local owners—If courts could consider.

If lands have a certain market value on account of the greater demand for them among the people near the locality, such a thing cannot be ignored, but must be considered. Arguments based on the return which investments in Government securities may fetch are not helpful.

The Government Pleader (*P. Venkataramana Rao*), and *C. V. Harihara Iyer* for Appellants.

S. Varadachariar and *K. P. Ramakrishna Iyer* for Respondents.

S.V.V.

Sundaram Chetty, J. S.A. No. 64 of 1926.
3rd September, 1929.

Mutt—Matadhipathi—Permanent lease by—Validity of—If grantor can himself question.

A matadhipathi granted a permanent lease of a land forming part of the general endowments of the mutt for purposes neither beneficial nor necessary to the mutt.

Held.—A matadhipathi is not a mere trustee, but has an estate for life in the permanent endowments of the mutt and an absolute property in the income derived from offerings subject to the burden

of maintaining the institution. A permanent lease granted by him will therefore be good for his lifetime. But as regards any property shown to be vested in him on specific trust for a specific purpose, he would only be a mere trustee and as such an absolute sale or a permanent lease created by him would be void.

T. V. Ramanatha Iyer assisted by *S. Sitaraman* and *S. Rajaraman* for Appellants.

V. Balasundaram Iyer for Respondent.

S.V.V.

Ramesam and Jackson, JJ. A.S. No. 116 of 1925.
3rd September, 1929.

Nattukottai Chetty—Money received by—Unconditional undertaking to pay—If can be treated as a deposit—Time taken in proceedings to declare the instrument invalid—If can be excluded.

Where an instrument contains an unconditional undertaking to pay, S. 91, Evidence Act, precludes the addition of any words like 'on demand' to the instrument and there is no presumption of 'deposit' from the mere fact that the money was left with a Nattukottai Chetti.

10 L.W. 67, distinguished.

Time taken by proceedings to declare the instrument void as having been brought about by coercion cannot be deducted under S. 14 of the Limitation Act, 1908; in respect of a suit to recover the money.

21 L.W. 916 and 50 Mad. 417, followed.

F. S. Vas for Appellant.

S. Varadachariar and *K. R. Rama Ayyar* for Respondents.

S.V.V.

Ramesam and Jackson, JJ. C.M.P. Nos. 1674 and 1676 of 1928.
30th August, 1929.

Civil Procedure Code, S. 110—*Leave to appeal to Privy Council —Reversioner's suit to set aside alienations—Appeal by reversioner against items dismissed—Cross-objections by alienees—Appeal dismissed, cross-objections allowed—One decree drawn up—If reversing judgment.*

Where the High Court dismissed the reversioner's appeal to set aside certain alienations and allowed the aliener's memorandum of objections regarding other alienations, the High Court's decree can be said to be reversing only as far as the objections allowed are concerned and not with regard to the appeal dismissed as each alienation is a distinct matter by itself.

56 M.L.J. 476 distinguished.

51 Cal. 969 (P.C.) referred to.

P. Satyanarayana Rao for Petitioners.

Ch. Raghava Rao for Respondents.

S.V.V.

Ananthakrishna Aiyar, J. S.A. No. 20 of 1926.
2nd September, 1929.

Evidence Act, S. 116—*Suit in ejectment—Defendant's title not proved—Defendant's father tenant of plaintiff—Effect.*

In a suit in ejectment, it was found that the defendant's father, had taken a lease-deed from the plaintiff agreeing to surrender possession of the leased property after the expiry of the lease.

Held that, though the admission in the lease that the plaintiff had title might not by itself confer title on the plaintiff, the defendant was estopped from questioning the title of the plaintiff without surrendering possession of the property and as the defendant had not proved any title to the property in himself, the plaintiff was bound to succeed on his possessory title.

S. Panchapakesa Sastri and *S. V. Narayana Aiyar* for Appellant.

K. Rajah Aiyar for *K. Bhashyam Aiyangar* and *J. R. Cundappa Rao* for Respondent.

S.V.V.

Sundaram Chetty, J. S.A. No. 309 of 1926.
3rd September, 1929.

Religious Endowment—Temple trustee—Agent of borrowing money without necessity but applying the funds for the temple—Decree against temple property, if to be given.

Where in a suit on a promissory note executed by the agent of a temple trustee, it was found that the money borrowed was applied for temple purposes, but it was not established that there was any "financial necessity" for the temple to borrow:

Held, that no decree could be passed against the assets of the temple.

21 M.L.J. 129 referred to.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellant.

Watrap S. Subramania Aiyar for Respondent.

P.R.N.

Venkatasubba Rao and Madhavan Nair, JJ.
4th September, 1929.

L.P.A. Nos. 255 to 258 of 1925.

Interest—Rent—Arrears of—Interest on arrears if can be claimed—Charge created on land—If makes any difference—Interest Act XXXII of 1839.

Where no definite period is fixed for payment of the rent and the rent also varies with the extent of the land cultivated and the cess paid, no interest can be awarded under the Interest Act. Nor can interest be awarded on equitable grounds. The test for determining whether interest can be awarded on equitable grounds is "whether a Court of equity would ordinarily award interest in such cases."

42 Mad. 661 and cases following it doubted.

Interest cannot be awarded under S. 73, Ill. (*n*) to the Contract Act either.

20 Mad. 481 followed.

But if rent is charged on the land, then although nothing is said in the contract as to interest, interest is awardable.

(1903) 1 Ch. 781 followed.

B. Sitarama Rao and *P. S. Narayanaswami Aiyar* for Appellants.

T. R. Venkatarama Sastri and *T. B. Balagopalan* for Respondents.

S.V.V.

Sundaram Chetty, J.
4th September, 1929.

S.A. No. 320 of 1926.

Lessor and Lessee—Lease for one year—Unregistered—Enhanced rent fixed in the event of lessee's overstay beyond time of lease—Admissibility to prove enhanced rent—Court's power to grant.

Where a lease of immoveable property (shop) was unregistered, it cannot be admitted to show a stipulation for enhanced rent in the event of lessee's overstay. But as by non-delivery of possession, the lessee commits a breach of the contract to deliver, the Court can award a reasonable compensation under sections 73 and

74 of the Contract Act for any loss caused to the lessor by such breach.

S. T. Srinivasagopalachari for Appellant.

C. V. Subramania Aiyar for Respondent.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
4th September, 1929.

C.M.A. No. 273 of 1929.

Election—Revising Board—Personal interest of a member of, against a voter—If disqualifies him from considering the voter's qualifications—Submission to jurisdiction—Effect of—Two members delivering judgment in the absence of the third—Regularity of.

Where the Chairman of an Electoral Revising Board is in such a position that personal interest against a voter whose qualification to vote is in question can be assumed, then he ought not to take part in the decision or sit upon the tribunal deciding the particular voter's case.

(1926) A.C. 581 followed.

But if the voter being aware of such bias or personal interest stands by and takes the chance of a decision in his favour, he cannot afterwards object to the constitution of the tribunal when he finds his expectations are going to be frustrated.

Two of the members of the Board had written their judgments and delivered them in open Court in the absence of the third who desired to hear the applicant further. The third member subsequently heard him and differed from the other two.

Held, it was not a valid judgment, every judicial act done by several Judges ought to be completed in the presence of all of them and after deliberate joint discussion and more so when there is difference between the Judges.

6 All. 468 referred to and followed.

T. Rangachariar and *A. Srirangachariar* for Appellant.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Respondent.

S.V.V.

Wallace and Jackson, JJ.
6th September, 1929.

A.S. No. 142 of 1925.

Custom—Nattukattai Chetties—Sridhanam of a woman—Death of her issue without issue—Whether devolves on her father—Custom, if can be extended by parity of reasoning or supplemented by Hindu Law.

A custom to the effect that amongst Nattukottai Chetties the stridhanam property of a woman devolves on her father not only when she dies without issue, but even on the death of such issue.

without issue, held not proved. It is not sufficient for this purpose merely to prove a custom in respect of the first step, *viz.*, that if a woman dies without issue, her stridhanam devolves on her father and his heirs and not on her husband or his heirs.

A custom in derogation of Hindu Law must be clearly proved and cannot by mere parity of reasoning be extended beyond the actual usage proved.

37 Cal. 322 referred to.

Also, either the custom pleaded must be relied on or the general law as such. It is not open to a party to take in custom to a certain extent and seek to supplement it by incidents derived from the Hindu Law.

Observations on the vagueness and uncertainty of the conception of "stridhanam" as disclosed by the evidence in the case.

S. Varadachariar for *K. S. Champakesa Aiyangar* for Appellant.

M. Patanjali Sastri and *K. Ramanathan Chettiar* for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1464 of 1927.
10th September, 1929.

Civil Procedure Code—Common judgment in two connected suits—Evidence common to both—Separate decrees drawn up—Appeal against only one decree—If the other decree becomes final and precludes the Appellate Court from trying the appeal.

When two connected suits are tried together, evidence being by consent common to both and two decrees are drawn up but an appeal is preferred against only one of the decrees, the decree unappealed does not operate as *res judicata* so as to render the appeal infructuous. The Appellate Court may regularise it by insisting on the appellant amending his memorandum of appeal so as to make it an appeal against both the decrees or may require him to fill a separate appeal and excuse the delay.

29 M. 333 is not overruled by 46 M. 895 (P.C.).

L.P.A. No. 60 of 1923 followed and 43 M. 550 referred to.

A case of acquisition by a mortgagee in possession of the equity of redemption in the mortgaged properties by adverse possession should be specifically alleged and strictly proved.

37 M. 545 and 44 M. 253 distinguished.

V. Govindarajachari for Appellant.

B. Somayya for *Advocate-General* and *M. Venkatasubbiah* for Respondent.

S.V.V.

The Chief Justice and Cornish, J. L.P.A. No. 132 of 1925.
10th September, 1929.

Limitation Act, Art. 143—*Lease—Alienation in contravention of the terms of it—Suit for recovery of possession by lessor against alienees—Limitation.*

A suit by the lessor to recover possession of the leased properties against the alienee from the lessee on the ground that the alienation is in contravention of the terms of the lease-deed is governed by Art. 143 of the Limitation Act.

15 M. 123: 38 M.L.J. 275 followed.

B Sitarama Row and *P. S. Narayanaswami Aiyar* for Appellant.

K. Kutti Krishna Menon and *P. S. Ramachandra Aiyar* for Respondent.

S.V.V.

Sundaram Chetty, J. S.A. No. 30 of 1926.
10th September, 1929.

Pleading—Variation between pleading and proof—Plaintiff claiming a large relief—Facts found entitling him to lesser relief—Plaintiff consistently denying the true facts—Of relief can be granted on basis thereof.

In a suit on a contract, the plaintiff persistently denied the defendant's case which would entitle the plaintiff only to a lesser relief than prayed for. The Court found the defendant's version to be true.

Held, the Court, as a Court of Law and equity would be justified in granting a lesser relief to the plaintiff on what is found to be the true facts despite the plaintiff's denial.

23 W.R. 369: 28 A. 482; 30 M.L.J. 444 followed.

The test in such cases is whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence.

50 C. 292 followed.

C. Rama Rao for Appellant.

G. Lakshmanna for Respondent.

S.V.V.

Ananthakrishna Aiyar, J. S.A. No. 1464 of 1927.
11th September, 1929.

Res judicata—*Connected suits having same parties and subject-matter—Appeal from decree in one—Decree in unappealed suit, if bars appeal.*

When there are two connected suits involving the same subject-matter, and the defeated party files an appeal against the decree

in one of them, but fails to appeal against the decree in the other, the parties to the appeal being also parties to the connected suit, the omission to file an appeal against the connected suit does not bar the hearing of the appeal. Procedure in such cases pointed out.

V. Govindarajachari for Appellant.

The Advocate-General for Respondent.

P.R.N.

Ramesam and Jackson, JJ. A.S. Nos. 127 of 1926 and 60 of 1928.
12th September, 1929.

Trust—Suit for accounts against a co-trustee—No specific breach of trust or threatened breach of trust proved—If suit maintainable.

Where there is no proof or allegation of any specific breach of trust or threatened breach of trust on the part of the couralars so as to justify an apprehension on the part of the plaintiffs that they would also be held liable for the breach on the ground that they did not take proper action against their co-trustee, a suit to render an account of their management is not maintainable.

103 I.C. 225 followed.

45 M. 113 distinguished.

The same rule applies to public trusts also.

K. P. M. Menon and *K. Kutti Krishna Menon* for Appellant.

The Advocate-General for *P. Govinda Menon* for Respondents.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 418 of 1924.
13th September, 1929.

Civil Procedure Code, S. 92*—Scheme suit—Sanction accorded to three persons—Two alone suing—Suit if maintainable—Reliefs other than for mere scheme—If can be asked for.*

Three persons as persons interested in the affairs of a temple applied to the Advocate-General for sanction and obtained it *ex parte* without notice to the trustees, the relief prayed for being a scheme on the ground of the mis-management of the trustees. The suit was later instituted by only two of them, the third being made a party defendant and claimed also other reliefs.

Held that, a suit by some only of the persons to whom sanction was given would not lie because the sanctioning authority might have been influenced in granting the sanction by the status, solvency, etc., of the omitted person and it may well be that the sanction might not have been given but for such person's association.

29 M.L.J. 231; 38 M. 1192 followed.

Cases of suits by trustees stand on a different footing as it is the trust which has then the right of action and is the plaintiff. Even then if the act which gives rise to the cause of action is an act which has to be done by all the trustees together or in consultation with each other, a suit filed without consulting the others or by simply joining the others as defendants will be bad.

Also cases which hold that after the suit, if one of the persons die, there is no abatement do not apply as the suit has been *rightly instituted* and the Court gets seisin of the case.

Although sanction obtained *ex parte* is not invalid, it would be desirable to give notice before giving sanction. It is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the sanction.

11 M. 148; 21 Bom. 257 followed.

Advocate-General and *P. V. Vallabhacharyulu* for Appellants.

S. Varadachariar and *V. Govindarajachari* for Respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ.
13th September, 1929.

C.M.A. No. 288 of 1927.

Civil Procedure Code, O. 22, R. 4—Mortgage decree—Death of a party after preliminary decree—Two legal representatives already on record—No petition to add L.R. put in—Final decree passed and sale thereon—One L.R. omitted and not a party—Of sale binding on him.

A suit was filed on a mortgage against a father, mother and son, parties being Mahomedans. After the preliminary decree, the son died and his legal representatives were the father, widow, and an infant son. The first two were already parties. The infant son was not made a party to the suit and a final decree was passed. Sale followed and the son impugned the final decree and sale as not binding on him.

Held that, though the representation may be incomplete, it was sufficient and in the absence of any fraud or collusion, the decree bound the estate in the hands of the infant son as well.

32 C. 296 (P C.); 26 M. 230: 33 M. 6; 47 A. 466 followed.

38 M. 682; 50 M.L.J. 232; 53 C. 166 distinguished on the ground that the decree in those cases was void and a nullity.

The question as to what the result would be if the son had died before the passing of the preliminary decree left open, Venkatasubba Rao, J., doubting if even then O. 22, R. 4 will apply.

B. Sitarama Rao for Appellant.

P. Govinda Menon for Respondent.

S.V.V.

Waller, J. I.P. No. 328 of 1926.
13*th September*, 1929.

Insolvency—Adjudication by foreign Court—Effect—Properties in British India, if vest in the Official Assignee—Rights of execution creditor in British India.

Where a person was adjudicated an insolvent by the Supreme Court of Singapore, another person obtained an *ex parte* decree against the insolvent in British India and attached his immoveable properties. The Official Assignee of Singapore obtained an order of request from the Colonial Court to the Insolvency Court in India to act in aid of the Colonial insolvency and applied in the British Indian Court for stay of further execution by way of sale on the ground that no execution, unless completed by sale, could be effective against him.

Held, that the adjudication in the foreign Court of Singapore did not have the effect of vesting the immoveable properties of the insolvent in British India in the Official Assignee of Singapore and the execution proceedings must proceed.

1910 A.C. 508 followed.

V. Varadaraja Mudaliar for Official Assignee.

V. K. Srinivasa Aiyangar and *T. K. Rangasami* for Attaching Creditor.

N.S.

Ramesam, J. C.R.P. No. 899 of 1929.
17*th September*, 1929.

Madras Civil Rules of Practice, Chap. X, R. 30*—Filing of fee certificate—Actual payment whether always necessary—Adjustment or receipt of promissory note—Validity.*

There may be cases in which the fee due to a vakil may be adjusted otherwise than by actual payment of money. Such an adjustment, however, must be something more than a mere agreement to pay. When a promissory note is given to a vakil it may be equivalent to payment of money. It is doubtful if note (*ii*) to R. 30 of Chap. X of the Civil Rules of Practice is correct.

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for Petitioner.

The Advocate-General amicus curiæ.

N.S.

Anantakrishna Aiyar, J. S.A. No. 1088 of 1921.
17th September, 1929.

Madras Estates Land Act, S. 8, *Exception—Agraharam held to be estate by Privy Council—Subsequent suit respecting other lands in—Jurisdiction of Civil Court—Plea of acquisition of kudivaram by Agraharamdars—Sustainability.*

In a suit instituted for arrears of rent by an Agraharamdar of Arepalli, the defendants pleaded want of jurisdiction in a Civil Court because the Agraharam of Arepalli is an "estate" within the meaning of the Madras Estates Land Act.

The Privy Council on appeal from suits relating to certain other lands situate in the same Agraharam as per decision reported in 52 Mad. 453, held on a construction of the grant that Arepalli Agraharam is an "estate" within the meaning of S. 3, cl. (2) (*d*).

Held, consequent upon the Privy Council decision, it was still open to the parties in the present appeal to show "whether the Agraharamdars acquired kudivaram interest subsequently to the grant in individual holdings, so as to bring it within the meaning of exception to section 8," though in those cases the Privy Council directed the return of plaints for presentation to the proper Court in view of admissions made in the course of and for the purpose of those proceedings that the Agraharamdars did not acquire the kudivaram interest subsequently.

P. Satyanarayana Rao for Appellant.

G. Lakshmanna for Respondent.

P.R.N.

Curgenven, J. C.R.P. No. 169 of 1929.
18th September, 1929.

Civil Procedure Code, S. 115—*Election cases—Revision.*

The High Court will not interfere in revision in election cases, except where a real question of jurisdiction is involved.

(1927) M.W.N. 842 (F.B.) referred to.

P. Venkataramana Rao for Petitioner.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 467 of 1928.
18th September, 1929.

Abkari Act—Partnership relating to Abkari business—Validity.

A partnership relating to Abkari contract is not invalid except where it involves a transfer of the business.

A. Visvanatha Aiyar and *A. Ramaswami Aiyar* for Appellant.

A. C. Sampath Aiyangar and *T. R. Srinivasan* for Respondent.

N.S.

N.R.C.

Anantakrishna Aiyar, J. S.A. No. 31 of 1928.
19th September, 1929.

Madras Estates Land Act, S. 59—*Commutation of varam into cash rent—Stipulation for payment of interest—If amount to enhancement of rent.*

Where varam rent was commuted into cash rent payable in instalments and the patta contained a stipulation for payment of interest on overdue instalments,

Held, that the stipulation for payment of interest did not amount to an enhancement of rent.

V. Govindarajachari for Appellant.

Y. Suryanarayana for Respondent.

N.S.

Wallace, J. S.A. No. 88 of 1926.
19th September, 1929.

Madras Local Boards Act (*XIV of* 1920), *Ss.* 60 *and* 237—*Union Board—Constitution of—Suit by Board before its due constitution claiming a site as part of public street—Maintainability—Right of Taluk Board to maintain such a suit.*

Where a Survey Officer made an order that a site was not a part of public street, and a Union Board brought a suit for setting aside that order, but the Union Board had not been duly constituted under a Government notification as required by the Madras Local Boards Act of 1920 on the date of the suit,

Held, that the suit was not maintainable, even though such a Government notification was issued subsequent to the institution of the suit and before the trial.

Held, further, that, as the right to maintain suits in respect of public streets which vested in the Taluk Board under the old Act passed to the same Taluk Board under S. 237 of the new Act, only the Taluk Board could maintain the action in the absence of any Government notification divesting that right from that Taluk Board on the date of the suit.

K. Bhashyam and *T. R. Srinivasan* for Appellant.

K. V. Krishnaswami Aiyar, V. Rajagopalier and *T. V. Ramiah* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 249 of 1926.
26th September, 1929.

Presumption—Person entitled to a share in property—Part of it held in absolute right and part in qualified right—Sale of part of it—Identification not possible—Presumption to be drawn in such cases.

Where a person has in his hands properties, over some of which he has an absolute right and over others a limited right, and sells a

portion of the properties to a third person, without stating which of those he is selling, and where it is not possible to identify the properties he is absolutely entitled to, the Court can assume that he sold the property over which he had an absolute right.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellants.

S. Varadachariar and *S. V. Venugopalachariar* for Respondents.

N.S.

Kumaraswami Sastri and Walsh, JJ. Appeal No. 406 of 1924.

3rd October, 1929.

Compromise decree—Clause having the effect of operating as a clog on the equity of redemption—Validity.

A clause having the effect of operating as a clog on the equity of redemption can be relieved against even though it is found in a compromise decree, as such a decree has no higher legal effect than a contract between the parties.

T. Rangachariar and *B. Sitarama Rao* for Appellant.

The Advocate-General and *P. Govinda Menon* for Respondent.

N.S.

Curgenven, J. C.R.P. No. 1607 of 1927.

3rd October, 1929.

Civil Procedure Code, O. 1, *R.* 10—*Plaint as filed beyond the jurisdiction of the Court—If and when Court can transpose.*

An assignee from a landlord sued to eject a prior lessee as holding over after the expiry of his lease and paid Court-fee as on one year's rental. On objection being taken as to jurisdiction the Court heard arguments on that issue and presumably made up its mind. But then at the instance of the plaintiff, the landlord (who was a defendant) was transposed to bring the case under S. 7, cl. (11).

Held, as the suit as laid was beyond the jurisdiction of the Court and the Court had on hearing arguments presumably felt it so, the Court cannot transpose, but must have returned the plaint.

41 Mad. 701 followed.

P. Satyanarayana Rao for Petitioner.

S. V. Venugopalachari for Respondent.

N.S.

Madhavan Nair and Cornish, JJ. C.R.P. No. 1357 of 1927.

4th October, 1929.

Legal Practitioners Act, S. 28—*Pleader—Oral agreement to pay fees—Suit for recovery of—Maintainability.*

An oral agreement by a client to pay fees to a pleader is void and unsustainable under S. 28 of the Legal Practitioners Act. In such a case the principle of *quantum meruit* does not apply.

27 Mad. 512 and 27 M.L.J. 278 referred to and explained.

S. Rangaswami for *B. Venkatraman* for Petitioner.

S. Rangachari for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 60 of 1926.
7th October, 1929.

Hindu Law—Father—Mortgage providing for simple interest and enhanced compound interest on default—Settlement of amount by remitting some amount out of the total amount—Subsequent mortgage for the amount settled on all the properties except one item released—Settlement, if binding on sons—Penalty—Award of reasonable compensation—Award of lump amount arbitrarily—Propriety—Suit by mortgagee—Decree for a less amount—Costs—Proper order.

A Hindu father executed a mortgage providing for simple interest at 15 per cent. per annum and in default for compound interest at 18 per cent. per annum from date of default, in settlement of a prior hypothecation which provided for 12 per cent. simple interest and in default 15 per cent. compound interest. The principal amount for the later mortgage was arrived at by calculating the penal enhanced compound interest at 15 per cent. and by remitting from the total sum a small amount. Also one of the properties comprised in the original mortgage was released in the later mortgage.

Held (in a suit on the later mortgage):

(1) that, though the original bond provided for penal rate of interest, the settlement was binding on the sons and could not be re-opened, as the settlement was arrived at in consideration of the release of one of the properties and the remission of a certain amount;

(2) that, in cases of penalty, reasonable compensation which is awarded must be on some legal principle and must not be fixed arbitrarily at a certain amount; and

(3) that, the principle that a mortgagee is entitled to his costs is applicable only when he is a defendant, but, when as plaintiff he makes a claim for a large sum and gets a decree for a less amount, he can get costs only on the sum allowed and must pay costs on the sum disallowed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondent.

N.S.

Jackson, J. C.R.P. No. 959 of 1928.
7th October, 1929.

Civil Procedure Code, O. 7, Rr. 10 *and* 11—*Suit for possession of immoveable property—Undervaluation—Correct valuation rendering Court incompetent to entertain suit—Procedure to be followed.*

Where a suit for recovery of possession of immoveable property was undervalued and the Court before which it was filed found, after investigation, that the correct valuation would render it incompetent to entertain the suit,

Held, that the proper order to be passed by the Court was to return the plaint for presentation to the proper Court under O. 7, R. 10 and not to ask the plaintiff to pay deficient Court-fees and, on failure to pay the same, to reject the plaint under R. 11.

41 M. 701 referred to.

R. Kesava Aiyangar for Petitioner.

V. Rajagopala Aiyar and *T. V. Ramiah* for Respondent.

N.S.

Cornish, J. C.R.P. No. 553 of 1927.
8th October, 1929.

Negotiable Instrument—Endorsement—Suit by endorsee of pronote—Finding that endorsee abstracted the pronote from endorsor—Maintainability of suit.

Where, in a suit by the endorsee of a promissory note, it was found that the endorsee had abstracted the pronote from the custody of the endorsor, the endorsement does not vest any title in the endorsee as the endorsement was not followed by delivery with intent to pass title, and consequently, the suit is not maintainable.

P. J. Kuppanna Rao for Petitioner.

S. R. Muthuswami Aiyar for Respondent.

N.S.

Wallace, J. S.A. No. 1884 of 1926.
9th October, 1929.

Limitation Act, Art. 181—*Mortgage suit—Application to pass a final decree—Limitation—Commencement of.*

Where a preliminary decree in a mortgage suit was confirmed in Second Appeal by the High Court on the ground that there was no point of law for Second Appeal, the commencement of limitation for an application to pass a final decree is from the date of the High Court decree and not the Trial Court decree.

46 Cal. 620 (P.C.) distinguished.

B. Sitarama Rao and *C. V. Harihara Aiyar* for Appellant.

S. A. SesHadri for Respondent.

N.S.

Cornish, J. C.R.P. No. 466 of 1927.
9th October, 1929.

Civil Procedure Code, S. 115—*Other remedy open—Interference in revision.*

Where an application under S. 41, cl. (3) of the Guardian and Wards Act by the ward, after attaining age, against the guardian to render accounts was dismissed by the District Court except as regards the account books and admitted cash in his possession which were ordered to be put into Court,

Held (on revision), that no revision lay as a remedy by suit was available.

33 Bom. 419, 7 I.C. 214 and 34 Cal. 211 followed.

K. Rajah Aiyar and *V. Ramasami Aiyar* for Petitioner.

S. R. Muthusami Aiyar for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. No. 449 of 1926.
11*th October*, 1929.

Hindu Law—Maintenance of widow—If private properties of the widow to be taken into consideration in fixing the quantum.

Where a widow in possession of productive private properties claimed maintenance from her co-widow and her son, etc., and the income of the properties was enough to support the family and possibly even more,

Held, the right to maintenance is an absolute right and does not depend on the necessity arising from want of other means to support themselves and as such though the possession of means may be a factor to be considered when her husband's family is not possessed of sufficient properties, it cannot be taken into consideration when the properties are more than enough.

38 M. 153 explained.

Analogy of 4 M. 171 applied.

Unless the claim for maintenance is exorbitant, the Court ought not to disallow costs to the widow or allow the defendant proportionate costs on the amount disallowed.

21 M.L.J. 706 followed.

R. Ramamurti for *M. Venkatasubbiah* for Appellant.

B. Somayya for Respondent.

S.V.V.

Curgenven, J. C.R.P. No. 243 of 1928.
3rd October, 1929.

Civil Procedure Code, O. 47, Rr. 1 *and* 2—*"Clerical or arithmetical mistake or error apparent on the face of the decree"—If means the same thing as "mistake or error apparent on the face of the record" in R.* 1—*Decree in conformity with judgment—Prior to review under R.* 2.

Where in a suit for dessolution of partnership costs were awarded personally against defendants 4 to 6 of whom some were minors, and the decree was in conformity with the judgment, and subsequently an application for review was made to the succeessor of the Judge, who passed the decree, on the ground of error apparent on the face of the record,

Held, that the application could be made only on the ground that there was "a clerical or arithmetical mistake or error apparent on the face of the decree." Rule 2 of Order 47, Civil Procedure Code. This phrase under this rule cannot be construed to mean "mistake or *an error* apparent on the face of the decree" as in Rule 1.

24 L.W. 447 referred to and followed.

S. Panchapakesa Sastri for *C. Krishnamachari* for Petitioner.

K. Bhashyam Aiyangar and *T. D. Srinivasachari* for Respondent.

N.S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. *In the matter of* a First Grade Pleader.
7th October, 1929.

Legal Practitioners Act, S. 13 (*b*)—*Legal practitioner taking money from client for filing suit and failing to do so, but intimating to client that suit was filed.*

Where a legal practitioner was paid money and stamps by a client for instituting a suit for recovery of a house, but never filed the same, though he, on several occasions, wrote to the party stating that suit was filed and giving the date of hearing of the suit and pleaded as a justification that he wrote the letters to client to pacify her on instructions from her friend who was helping her:

Held, that the pleader was guilty of unprofessional conduct within the meaning of S. 13 (*b*) of the Legal Practitioners Act.

The Advocate-General for The Bar.

T. M. Krishnaswami Aiyar and *M. S. Venkatarama Aiyar* for Pleader.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. Nos. 169 & 170 of 1929.
11th October, 1929.

Income-tax Act, S. 4 (2)—*Partner having sharers in Indian and Foreign firms—Sums due by Foreign firm to Indian firm—*

Remittance by former to Indian firm—Drawings by partner, out of—If taxable.

Where a partner owned shares in two firms one in India and another outside India and the latter owed moneys to the Indian firm and sent sums to the Indian firm towards the said debt and the debt was discharged leaving a margin, and the partner drew sums from the Indian firm.

Held, that such drawings cannot be assessed to income-tax under S. 4 (2) of the Act, but that the amounts remitted to the firm could be assessed only on the firm.

Held further, that a letter written by the partner from India to the Foreign firm asking the firm to send profits to India or to credit them in the accounts did not constitute sufficient evidence that the amounts remitted were profits taxable under S. 4 (2) of the Act.

M. Patanjali Sastri for The Commissioner of Income-tax.

K. S. Krishnaswami Aiyangar and *R. Kesava Aiyangar* for Assessee.

P.R.N.

Ramesam and Cornish, JJ. O.S.A. Nos. 75 and 79 of 1929.
16th October, 1929.

Presidency Towns Insolvency Act, Sch. II, Rr. 18, 19 *and* 20—*Scope of—Sale by Court and sale under orders of Court—Power of Court to confirm the sale and direct possession to be given.*

The Court, while approving of a composition by the creditors of an insolvent under which the guarantors on payment of Rs. 11,000 were given possession of all the estate of the insolvent by the mortgagee, gave liberty to sell items of property mortgaged by the insolvent. A purchaser under such sale applied to the Court for confirmation of the sale and possession from the guarantors.

Held, whether the sale is to be considered as one by the Court or one out of Court under orders of Court, under R. 18 read together with Rr. 19 and 20 of Sch. II of the Presidency Towns Insolvency Act, the Court has jurisdiction to confirm the sale and to direct possession to be given.

40 Cal. 140; 48 All. 209; 16 C.W.N. 394 considered.

S. Duraiswami Aiyar and *A. K. Ramachandra Aiyar* for Appellants.

V. V. Srinivasa Aiyangar and *V. Varadaraja Mudaliar, A. Kuppuswami Aiyar* and *M. Ramachandra Rao* for Respondents.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 121 of 1929.
17th October, 1929.

Income-tax Act, Ss. 22 *and* 23—*Combined notice under* S. 22 (4) *and* 23 (2)—*Legality—Assessee failing to produce accounts—Assessment under S.* 23 (4)—*Validity.*

Where an assessee was assessed to income-tax under S. 23 (4) in consequence of his failure to produce to submit a proper return, but such assessment was on appeal cancelled by the Assistant Commissioner who directed a fresh assessment, and the Income-tax officer thereupon issued a combined notice under S. 22 (4) and S. 23 (2) calling upon the assessee to produce accounts, and the assessee failing to produce the same, the Income-tax officer assessed him to income-tax under S. 23 (4):

Held, (1) that the combined notice was valid in law;

(2) that the failure to give notice under S. 23 (2) did not preclude the Income-tax officer from assessing under S. 23 (4); and

(3) that the failure of the assessee to comply with a notice under S. 22 (4) or S. 23 (2) entailed the penalty of being assessed under S. 23 (4) on the estimate basis.

K. V. Krishnaswami Aiyar, V. Rajagopala Aiyar and *T. V. Ramiah* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 244 of 1928 and O.P. No. 16 of 1929.
18th October, 1929.

Income-tax Act, Ss. 10 (2) (*vi*) *and* 24—*Assessee having several businesses—Depreciation allowance in respect of one business—Set off against profits and gains of another business—Right to.*

Where an assessee owned a number of businesses, in one which the profits were not enough to cover the depreciation allowance in respect of machinery under S. 10 (2) (*vi*) of the Income-tax Act, and claimed to set off such excess depreciation against the profits of the other businesses:

Held, that the assessee was entitled under S. 24 of the Act to set off such loss or depreciation as against the profits arising from other businesses or other heads of income.

Held further, that the proviso to section 10 (2) (*vi*) would not prevent the assessee from treating depreciation allowance in the same way as other charges mentioned in S. 10, and that such depreciation allowance was on the same footing as expenses or charges for repairing buildings or machinery used in the business.

"Profits" in section 10 means the aggregate profits gained by the assessee from all his businesses taken together.

T. M. Krishnaswami Aiyar for *M. Subbaroya Aiyar* and *T. P. Gopalakrishna Aiyar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. 22nd *October*, 1929.

Cr. Rev. Cas. No. 941 of 1928.

Criminal Procedure Code, Ss. 256 *and* 257—*Applicability to security proceedings.*

Held, S. 256 of the Code of Criminal Procedure, does not apply to security proceedings and therefore a person called upon to furnish security for good behaviour is not as of right entitled to have the prosecution witnesses already examined recalled for further cross-examination. He has, however, a right under S. 257 to file a list of witnesses for further cross-examination and would be entitled to cross-examine them, if the application is not vexation.

Nugent Grant and *R. Kesava Aiyangar* for Petitioner.

N. S. Mani for *The Public Prosecutor* for The Crown.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. 22nd *October*, 1929.

C.M.P. Nos. 2016 and 94 of 1929.

Practice—Second Appeals and Civil Revision Petitions—Consolidation of for purposes of Court-fees and Vakalats—Power of Court.

Though the High Court had inherent powers to consolidate appeals for the purpose of saving time and unnecessary expense, such power could not affect the levy of Court-fees payable to Court.

Where, therefore, a number of rent suits were disposed of by a common judgment, but separate decrees were drawn up, and appeals and civil revision petitions were filed against the decrees and it was sought to consolidate them so as to enable the filing of a single vakalat and payment of Court-fees on the consolidated amounts of the appeals and the revision petitions.

Held, that there was no power to consolidate so as to enable the party to file one single vakalat or to pay Court-fees on the consolidated value of the subject-matter only.

The Advocate-General and *M. Venkatasubbiah* for Petitioners in C.M.P. No. 2016 of 1929.

K. Bhashyam Aiyangar and *R. Sundaralingam* for Petitioners in C.M.P. No. 94 of 1929.

The Government Pleader for The Crown.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 275 of 1928.
10th October, 1929.

Indian Income-tax Act—Loss of cash by theft during the course of moneylending business—Whether deductible

The following question was referred to a Full Bench:—

"Whether or not the loss of cash by theft during the course of the moneylending business of an assessee, is deductible item in the computation of the taxable income."

V. Rajagopala Aiyar and *T V. Ramiah* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

N S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 179 of 1928.
15th October, 1929.

Income-tax Act, Ss 6 (iv) and 10—"Business"—Assessee carrying on moneylending business—Purchase of rubber plantation in lieu of debts due—Profits realised by sale of such property—Assessability to income-tax.

An assessee in the course of money dealings took an assignment from his debtor of certain rubber plantations in satisfaction of debts due to him. The purchase of the property, the income from and the expenditure in connection with the property were all entered in the accounts of the money-lending business. Later on he sold the plantations for a profit.

On a question as to whether such profits realised by the sale of the property were assessable to income-tax,

Held, that the profits realised by the sale were not casual, but profits from business and as such taxable as profits from business.

V. V. Srinivasa Aiyangar and *R. Kesava Aiyangar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. O.P. No. 262 of 1928.
15th October, 1929.

Income-tax Act, S. 6 (iv)—Business—Property purchased by money-lender in satisfaction of debts due—If part of business—Evidence necessary.

Where the assessee who was a money-lender purchased from his debtor a rubber plantation in discharge of debts due from the debtor and the fact of the purchase alone was entered in his accounts, but neither the income from the property nor the expenses of management were entered in the accounts.

N R C

Held, that there being no legal evidence to show that the property was treated as part of the business, the profits arising from the sale of the property were not profits from business assessable to income-tax.

K. Raja Aiyar and *V. Ramaswami Aiyar* for Assessee.

M. Patanjali Sastri for The Commissioner of Income-tax.

P.R.N.

Ramesam and Cornish, JJ. O.S.A. No. 32 of 1929.
18th October, 1929.

Madras High Court Fees Rules, O. 6, R. 1, cls. (b) and (c)—"Disposed of"—Meaning of—Judgment by confession—Mode of taxation of fees.

In a mortgage suit against defendants 1 to 4, 3rd and 4th defendants remained *ex parte,* but defendants 1 and 2 contested. When the case was taken up for trial, defendants 1 and 2 withdrew the defence and submitted to a decree. The plaintiff had however to examine the 1st defendant to prove his case against the *ex parte* defendants 3 and 4.

Held, that the plaintiffs were entitled to tax the fees according to clause (*b*) of Rule 1 of Order 6 of the Fee Rules, and not under clause (*c*), there being only a judgment by confession against defendants 1 and 2. The words "disposed of" in clause (*c*) do not mean disposed of in any manner, but adjudicated on the merits.

24 L.W. 808 referred to.

S. Krishnamurthy Aiyar for Appellant.

T. D. Srinivasachari for Respondent.

N.S.

Wallace and Madhavan Nair, JJ. S.A. No. 1532 of 1925.
22nd October, 1929.

Malabar Compensation for Tenant's Improvements Act—Applicability to building leases.

Held, that the Malabar Compensation for Tenants' Improvements was not confined to agricultural holdings but applied to building leases as well and consequently a lessee under a building lease was entitled, when sought to be ejected from the plot to compensation for the building erected by him in spite of a covenant in the lease-deed for restoration of vacant possession.

P. Govinda Menon for Appellant.

B. Sitarama Rao and *C. V. Harihara Aiyar* for Respondent.

P.R.N.

Wallace, J. S.A. Nos. 469 and 470 of 1926.
22nd October, 1929.

Limitation Act—Suit for accounts and money due under a registered agreement—Plea of set off of amounts due from plaintiff—Art. 89 *or* 116 *applicable.*

By a registered agreement, the parties had agreed that each was to manage the common properties for a period of two years alternately and to account to the other for his share of the income. In a suit for accounts and for money due thereunder, the defendant pleaded a set off of the amount due to him from the plaintiff on account of the latter's management for the prior period.

Held, though a claim for money due by an agent to the principal on taking of accounts falls under Art. 89, it also falls under Art. 116 as a claim for compensation for breach of the contract in writing registered.

"Compensation" in Art. 116 is used in a wider sense than "damages."

12 Cal. 357 followed.

44 Cal. 759 (P.C.) referred to.

K. Bhashyam Aiyangar and *R. Visvanathan* for Appellant.

K. Rajah Aiyar for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.R.P. Nos. 100 and 91 of 1929.
25th October, 1929.

Court Fees Act (*Madras*), 1922, *Sch. II, Arts.* 17, 17-A *and* 17-B—*Applicability—Madras Hindu Religious Endowments Act, S.* 84 (2)—*Application under—Court-fees.*

The Court-fee payable on an application under S. 84 (2) of the Madras Hindu Religious Endowments Act is fifteen rupees under Art. 17, Sch. II of the Madras Court Fees Act, 1922. Arts. 17-A and 17-B are not parts of Art. 17.

56 M.L.J. 113 dissented from.

56 M.L.J. 373 approved.

T. R. Ramachandra Aiyar, C. Unnikanda Menon and *K. Chandrasekara Thampan* for Petitioner in C.R.P. No. 100 of 1929.

P. Govinda Menon for Petitioner in C.R.P. No. 91 of 1929.

P. Venkataramana Rao for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.M.P. Nos. 1194 and 1259 of 1929.
1st November, 1929.

Practice—Civil revision petition from common judgment—Consolidation for purposes of vakalath and process fees—Power of High Court.

Held, the High Court had no power to consolidate civil revision petitions so as to enable the petitioner to file only one vakalath in all the petitions or to pay only one set of process fees, although the petitions may be from the same judgment and against the same respondent.

R. Sundaralingam for Petitioner.

The Government Pleader for The Crown.

P.R.N.

Jackson, J. C.R.P. No. 152 of 1929.
5th November, 1929.

Legal representative—Civil Procedure Code, S. 2, cl. (11)—*Undivided brother—Proof of separate assets if necessary.*

In a suit on a pro-note, the defendant died before decree leaving behind his undivided brothers as his nearest heirs. The brothers pleaded that the deceased left no separate assets and therefore were not legal representatives.

Held, the undivided coparceners in a joint Hindu family are not lagal representatives within the meaning of S. 2 (11), Civil Procedure Code and before the section can apply, there must be proof that the deceased left an *"estate"* which she proposed L.R.'s could have taken.

S. V. Venugopalachari for Petitioner.

P. R. Srinivasan for Respondent.

S.V.V.

Kumaraswami Sastri, Curgenven and Walsh, JJ. C.M.S.A. No. 153 of 1927.
5th November, 1929.

Civil Procedure Code, O. 38, *R.* 9—*Construction—Attachment before judgment—If terminates on dismissal of suit—Order of withdrawal—If necessary.*

An attachment before judgment comes to an end on the dismissal of the suit in which it was made, although no formal order withdrawing the attachment is made, and the attachment does not receive on the reversal of the dismissal on appeal.

T. V. Muthukrishna Aiyar for Petitioner.

M. S. Vaidyanatha Aiyar for Respondent.

N.S.

Kumaraswami Sastri, Curgenven and Walsh, JJ. L.P.A. No. 117 of 1925.
5th November, 1929.

Grant—Construction—Service grant—Nankavasth—Resumability—Tests—Pre-settlement grant with rights of alienation—Onus.

Where it was found that grants were made prior to the settlement, and the grantees enjoyed the properties with all rights of alienation:

Held, that the onus was on the grantor to prove that the grants were resumable, and that the grants being grants burdened with service and not grants in lieu of wages for services, they could not be resumed.

K. Bhashyam Aiyangar for *S. Srinivasa Aiyangar* and *S. Venkatesa Aiyangar* for Appellant.

G. Lakshmanna and *P. Vedachalam* for Respondents.

S.V.V.

Venkatasubba Rao and Madhavan Nair, JJ. C.M.A. No. 134 of 1928.
6th November, 1929.

Legal Practitioners Act (XVIII of 1879), S. 28—Promissory note in favour of pleader for balance of fees due—Promissory note if void.

Where by virtue of an oral agreement between a pleader and his client, a fee of Rs. 5,000 was agreed to be paid to the pleader and subsequently a promissory note was executed for the balance of fees due then:

Held, the promissory note was not void under S. 28 of the Legal Practitioners Act. Agreements entered into and reduced to writing with regard to part of the fees are valid even though the original agreement was only oral.

A. C. Sampath Aiyangar and *T. R. Srinivasa Aiyar* for Appellant.

B. Somayya and *Kasturi Seshagiri Rao* for Respondent.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 439 of 1927.
7th November, 1929.

Trust—Recent dedication, nature of—Usage as the test—Founder creating trust with intention as to surplus being appropriated by his family—Validity—Ambiguity as to nature of trust—Mode of construction.

Where the temple is of comparatively recent foundation and its origin well known and where there is no deed of gift or dedication, the nature of the dedication must be determined by the

usage. There is nothing illegal in the founder having created a trust to the effect that the temple should be maintained out of the offerings and that the balance should go to his family.

Where there is an ambiguity as to the trust, the course of action can be called in aid as inferring that the persons concerned in the trust have not been committing a breach of trust from the commencement.

L.R. 4 Ch. App. 722 relied on.

K. V. Krishnaswami Aiyar and *B. V. Viswanatha Aiyar* for Appellants.

T. Rangachariar, A. Srirangachari and *S. Ramanujam* for Respondents.

N.S.

Jackson, J. C.M.S.A. No. 42 of 1926.
8th November, 1929.

Provincial Insolvency Act, S. 31—S. 145, Civil Procedure Code—Surety bond executed prior to adjudication—Liability under—If a debt within the meaning of the Insolvency Act.

The insolvent had, prior to his adjudication, executed a surety bond under S. 145, Civil Procedure Code, undertaking to pay a sum of money in the event of his failing to produce certain moveable property entrusted to his custody.

Held, the liability is a debt within the meaning of the term in the Provincial Insolvency Act and the insolvent, who obtained a general protection order could not be arrested in proceedings to enforce the surety bond.

B. Somayya and *Kasturi Seshagiri Rao* for Appellant.

T. G. Raghavachari for Respondent.

S.V.V.

Jackson, J. C.M.P. No. 3871 of 1929.
12th November, 1929.

Civil Procedure Code (V of 1908), *O.* 41, *R.* 5—*Appeal against order refusing to set aside an* ex parte *decree—Applications therein for stay of further proceedings in pursuance of the decree—If competent.*

Where against an order refusing to set aside an *ex parte* preliminary mortgage decree, the defendant preferred a Civil Miscellaneous Appeal in which he put in an application for stay of further proceedings and execution in pursuance of the said *ex parte* decree, and a preliminary objection was raised that such an application was incompetent in the absence of any appeal from the decree itself.

Held, that in the absence of an appeal against the *ex parte* decree itself no application for the stay of further proceedings in

pursuance of the decree can be entertained in the Civil Miscellaneous Appeal.

I.L.R. 31 Cal. 1081 followed.

T. M. Krishnaswamy Aiyar and *T. V. Balagopal* for Petitioner.

Watrap S. Subrahmania Aiyar for Respondent.

P.R.N.

The Chief Justice, Krishnan, Pandalai and Curgenven, JJ. C.R.P. Nos. 1349 and 1350 of 1928.
12th November, 1929.

Provincial Insolvency Act, Ss. 25, 27 (2), 37 *and* 43—*Scope and construction—Order of adjudication fixing time for applying for discharge—Failure to apply within—Adjudication, if annulled* ipso facto—*Power of Court to extend time after expiry—Civil Procedure Code, S.* 148.

The failure of the insolvent to apply for discharge within the period fixed by the order of adjudication does not involve the automatic annulment of the adjudication, an express order of the Court being necessary for such annulment; and the Court has jurisdiction to extend the time for discharge under S. 27 (2) of the Provincial Insolvency Act, *read* with S. 148, Civil Procedure Code, even after the expiry of the time fixed.

S. V. Venugopalachari for Petitioner.

N. S. Srinivasa Aiyar for Respondent.

P.R.N.

Jackson, J. C.R.P. No. 924 of 1929.
13th November, 1929.

Indian Limitation Act (*IX of* 1908), *Art.* 164—*'Duly served'—Meaning of—Summons affixed to a house where defendant does not reside—If "due service."*

Where the defendant was living and carrying on business at a place far away from his family residence at which his undivided father alone was living and the plaintiff took out summonses to the defendant to his family house which were affixed to the outer door of that house and the Court declared such service was sufficient and passed an *ex parte* decree against the defendant who applied to have the same set aside, more than 30 days after the decree was passed on the ground that he became aware of the decree only within 15 days prior to his application and it appeared that the plaintiff was aware when he took the last of the summonses to the family house that the defendant was not living there.

Held (1) that notwithstanding the prior declaration of the Court that the service was sufficient the defendant was not "duly served," and (2) that the application to set aside the *ex parte* de-

cree though filed more than 30 days after the date of the decree was within time.

Watrap S. Subrahmania Aiyar for Petitioner.

T. Krishnasamy Aiyangar for Respondent.

P.R.N.

Kumaraswami Sastri, Curgenven and Walsh, JJ. S.A. No. 159 of 1926.

13th November, 1929.

Contract—Third party—Right of suit of—Sale-deed with direction for payment by purchaser of portion of sale price to seller's creditor—Right of latter to enforce against vendee.

A sale-deed of immoveable property contained a provision reserving a portion of the sale price for payment by the purchaser to the vendor's creditor. The latter taking advantage of the said provision sued the vendor and vendee jointly for recovery of his debt claiming a decree against the vendee also.

Held, that the creditor, being a third party, could not enforce the said provision in the sale-deed against the vendee.

B. Satyanarayana for Appellant.

K. Rajah Aiyar for Respondent.

P.R.N.

Anantakrishna Aiyar, J. S.A. Nos. 540 to 568 of 1928.

18th November, 1929.

Madras Estates Land Act, S. 52 (3)—Landlord exchanging pattas and muchilikas on the basis of cash rents—Assignee from landlord, if can revert to waram rates without exchange of fresh pattas and muchilikas.

To attract the operation of S. 52, cl. (3) of the Estates Land Act it is not necessary that the landlord who exchanged the pattas and muchilikas and the landlord that claims the new rates should be identical. Where a landlord who was a lessee from the proprietor had exchanged pattas and muchilikas claiming certain cash rents and after the expiry of the lease the assignee of the lessee's interest who had subsequently purchased the estate claimed to revert to waram rates:

Held, he was bound by the old pattas and could not revert to waram rates without exchanging fresh pattas and muchilikas.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellants.

T. Rangachariar and *A. Srirangachariar* for Respondents.

N.S.

Wallace, J. S.A. No. 1656 of 1928.
14*th November*, 1929.

Grant—Conversion of "channel poramboke" lands to "assessed waste"—Right of Government to grant them on Dharkast.

Lands, which were entered as "channel poramboke" in the settlement register, can be converted into "assessed waste" and validly granted on "Dharkast" by the Government.

T. M. Krishnasami Aiyar and *B. C. Seshachallam* for Appellant.

T. R. Venkatrama Sastri and *K. R. V. Sarma* for Respondent.

N.S.

Anantakrishna Aiyar, J. S.A. Nos. 2327 and 2364 to 2402 of 1927.
14*th November*, 1929.

Madras Estates Land Act, S. 52 (2)—Pattas tendered during the fasli—If sufficient to support a distraint for the arrears of that fasli.

The words "within 12 months of the Commencement of the period" in S. 52, cl. (2) of the Estates Land Act mean subsequent to the commencement of the fasli and pattas tendered during the fasli and before its expiry are valid and sufficient to support a distraint by the landholder under Chap. VI for the arrears of that fasli.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for Appellant.

P. S. Narayanasami Aiyar for Respondent.

N.S.

Wallace and Anantakrishna Aiyar, JJ. S. A. No. 280 of 1928.
20*th November*, 1929.

Trust—Public or private—Deed, construction of—Civil Procedure Code, S. 92—Sanction obtained only against one defendant—Maintainability of scheme suit as against other defendants.

Where, under a deed of settlement, it was provided that income from certain properties should be utilised for conducting charities in a choultry and for the worship of God Subramania installed in the choultry by the executants, and it was further provided that, out of the net income of the said properties, five of the members of the settlor's family should be maintained, and that the properties were to be managed by the settlors during their lifetime, and after their lifetime by their daughter's sons, and, failing such issues, the Government were to be in management and control of the properties.

Held, that what was created was a public charitable trust and not a mere charge over the properties for the benefit of the trust.

Where, in a suit instituted under S. 92 of Civil Procedure Code for framing a scheme in respect of certain charities, the

plaintiff obtained the sanction of the Collector only as against the first defendant and not against the other defendants.

Held, that such want of sanction against the other defendants was not a fatal defect which must entail the dismissal of the suit as against them, and that the Court had jurisdiction to grant time to the plaintiff for obtaining the sanction as against other defendants.

43 M. 755 referred to.

N. Sivaramakrishna Aiyar for Appellant.

R. Kuppusami Aiyar and *T. K. Subramanian* for Respondent.

N.S.

Jackson, J. Cr.R.C. No. 437 of 1929.
21*st November*, 1929.

Local Boards Act, Ss. 159 (1), 161 (2), 207 (*c*)—*Complaint by Local Board for alleged encroachment—Jurisdiction of Magistrate to decide question of encroachment.*

Where a Union Board instituted a criminal complaint under Ss. 159 (1), 161 (2), and 207 (*c*) of the Madras Local Boards Act, in respect of an alleged encroachment on street poramboke by the accused; and the Sub-Magistrate went into the question of alleged encroachment and dismissed the complaint on the ground that the Union Board had not satisfactorily proved that there was an encroachment.

Held, that the Sub-Magistrate had jurisdiction to decide the question of encroachment and that it was as much incumbent on the Union Board to furnish sufficient materials for a proper disposal before a Sub-Magistrate's Court as before a Civil Court.

N. Somasundaram for Complainant.

S. Jagadisa Aiyar for Accused.

The Public Prosecutor for the Crown.

N.S.

Jackson, J. C.R.P. No. 984 of 1929.
22*nd November*, 1929.

Hindu Law—Partition—Suit for partition against a minor—If effects a division in states.

The mere institution of a suit for partition against a minor co-parcener might operate as a severance in status; for, inasmuch as a Court could grant a decree for partition in suits instituted on behalf of minors, guardian also could express an unilateral declaration as to severance in status on behalf of minor.

P. Satyanarayana Rao for Petitioner.

V. Govindarajachari for *B. T. M. Raghavachari* for Respondent.

N.S.

Reilly and Cornish, JJ. O.S.A. No. 60 of 1928.
22nd November, 1929.

Banker and customer—Bank paying cheques of the principal endorsed by agent into agent's account—Negligence of Bank in omitting to enquire of principal—Principal later knowing of the payments from the agent—Absence of remonstration by the Principal to the Bank—If amounts to ratification of agent's acts and condoning the conversion—Negotiable Instruments Act, S. 131—*When can be availed of by the Bank.*

In the absence of an account for the principal with the Bank, the Bank paid into the agent's account cheques endorsed by the agent as agent. The principal knew of the agent's so signing. Later the principal opened an account in his own name but the Bank allowed the payments into agent's account to go on, of both crossed and uncrossed cheques.

Held, for an agent to endorse as agent cheques in favour of his principal and then pay them into his own account is a most suspicious proceeding and such a transaction ought to put the Bank on enquiry and an omission to make inquiry of or get authority from principals and to remain content with the reply of the suspected agent is not reasonable but negligent.

(1914) 3 K.B. 356; (1924) 1 K.B. 775 discussed.

But where the principal knew from the agent direct that the agent had been so paying cheques into his own account, and did not disapprove of what he was doing or even so much as expostulate to the Bank, the principal must be deemed to have unequivocally ratified the agent's act and it is immaterial that the principal did not appreciate the legal consequence of such ratification or did not know that the agent was misappropriating to his own use the moneys then credited to his account.

In order to avail itself of the protection given in S. 131, Negotiable Instruments Act, the Bank must show that it acted "without negligence," that is, "without want of reasonable care in reference to the interests of the true owner" in receiving payment of the crossed cheques.

16 T.L.R. followed.

Nugent Grant & O. T. G. Nambiar instructed by *Messrs. Morseby & Co.* for Appellants.

Vere Mockett & G. Rajagopalan instructed by *Messrs. King & Partridge* for Respondent.

N.S.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 223 of 1925.
25th November, 1929.

District Municipalities Act, S. 69—Farming of tolls without a formal contract as required by the section—Contract not enforceable

by the Municipality even if the farmer had taken possession—No difference between executed and executory contracts—Quantum meruit allowed.

Though S. 69 of the District Municipalities Act only provides that a contract made otherwise than in conformity with its provisions shall not be binding upon the Municipal Council, it cannot be held that such a contract can be enforced by the Municipal Council as against the other party. No distinction can be made for this purpose between cases where the contract remains executory and those where it has been executed on the part of the Municipality.

30 Mad. 290; 16 I.C. 890; 54 Cal. 969 followed.

45 M.L.J. 164; 28 Bom. 314 doubted.

Distinction between common law corporations and statutory bodies pointed out.

Though the contract as such cannot be enforced, the Municipality may be awarded relief on the basis of quantum meruit, where the other party has enjoyed benefit under the contract.

T. R. Venkatarama Sastriar for Appellant.

S. Varadachariar and *V. Balasundaram* for Respondent.

S.V.V.

Ananthakrishna Aiyar, J. S.A. Nos. 1184 and 1185 of 1926.
26th November, 1929.

Contract Act, S. 74—No interest originally but enhanced interest from date of default—The whole amount also to be paid—Penalty—Court if can award reasonable compensation.

Where a bond for payment of money stipulated that if the money should be paid in regular instalments as they fell due, there should be no interest but if default were committed in any one instalment, then the whole amount due for all the future instalments should be paid with interest at 15 per cent. from the date of the bond.

Held, the provision for payment of the full balance due is valid [*See* S. 74, illustration (*f*)]; but the provision for payment of enhanced interest not from date of default but from the date of the bond is *prima facie* penal and even though originally there was no interest payable and the rate of interest provided for in the document to be paid on default is not exhorbitant.

34 C. 150 (P.C.); 6 M. 167 followed.

36 M. 229 (F.B.) and 10 C.W.N. 1020 referred to.

M. Ramachandra Rao for Appellant.

Ch. Raghava Rao for Respondent.

S.V.V.

Venkatasubba Rao and C.M.A. No. 390 of 1929 &
Madhavan Nair, JJ. L.P.A. No. 106 of 1929.
18th November, 1929.

Provincial Insolvency Act, S. 78 (2)—Defendant adjudicated insolvent pending suit—Official receiver impleaded as party—Decree against insolvent and official receiver—Execution application filed three years after decree—If barred.

Where pending a suit the defendant became an insolvent and the Official receiver was made a party and decree passed against the insolvent and Official receiver, and where, after the adjudication was annulled, an execution application was filed more than 3 years after the date of the decree.

Held, that the application was not barred by limitation as S. 78 (2) of the Provincial Insolvency Act applied to the case.

C. S. Venkatachariar and *D. Ramaswamy Aiyangar* for Appellants.

K. Rajah Aiyar and *K. Venguswamy Aiyar* for Respondents.

N.S.

Venkatasubba Rao and R.C. No. 15 of 1928.
Madhavan Nair, JJ.
26th November, 1929.

City Municipalities Act, S. 110 and Schedule IV, R. 7—Branch office of a company opened in Madras—First year of its opening—Basis of taxation.

Where an incorporated company whose head office is not in the city transacts business in the city through an agent, the company shall be assessed for the first year of its agency on the basis of "zero" income in the year preceding the year of taxation under the proviso to Rule 7 of Sch. I and not on the basis of its paid up capital.

Madhavan Nair, J.—The construction being susceptible of two meanings, the benefit of the doubt must be given to the subject in construing a taxing statute.

K. Bhashyam Aiyangar and *R. Visvanathan* for the Subject.

S. Rajamanickam for the Corporation.

S.V.V.

Venkatasubba Rao and C.M.A. No. 269 of 1928.
Madhavan Nair, JJ.
26th November, 1929.

Registration Act, S. 77—"Making of order," meaning of—If limitation runs from date of signing the order or from the date when it is communicated.

Where an order is passed immediately in the presence of the parties, the order will be deemed to be made then but where it is

passed in the absence of the party, the time begins to run only from the date, when the order is communicated to the party.

An order dismissing a petition as time barred is as much an order of refusal as a refusal to register on the merits.

The Advocate-General (*A. Krishnaswami Aiyar*) and *V. Ramaswami Aiyar* for Appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for Respondent.

S.V.V.

Wallace, J. S.A. No. 726 of 1926.
28th November, 1929.

Evidence Act, S. 92—Consideration in sale-deed—If evidence can be let in of an oral agreement to pay off a mortgage on the property—If the consideration a term of the contract.

The sale-deed stated "I have sold to you for Rs. 280 the immoveable property, etc." and later added "If in respect of this any dispute arises from any quarter, I shall at my own expense set the same at rest. . . . . In respect of the said property, I have not created as yet any right or interest in favour of any." In fact there was a mortgage which the vendee was obliged to pay and in a suit to recover that amount, the vendor sought to let in evidence an oral agreement at the time of sale to pay the mortgage.

Held, that on the authorities it is open to a party to prove want of consideration or failure of consideration or a difference in the kind of consideration but it is not open to him to prove a variation in the amount of consideration, as the amount of consideration is clearly a term of the contract.

38 Mad. 514; 27 C.W.N. 496 followed.

22 A. 370 and 33 A. 340 explained.

31 M.L.J. 96, 49 M.L.J. 414, 10 L.W. 1 and similar cases have already enlarged too much the opportunities of avoiding S. 92.

G. Lakshmanna for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Curgenven, J. S.A. No. 1214 of 1926.
28th November, 1929.

Evidence Act, S. 90—Will—Construction—Bequest to daughter—"Having been transferred"—If conveys absolute estate or a limited estate—Evidence Act, S. 90—If there is a presumption as to disposing power also.

Where a testator conveys immoveable property in favour of a female other than a wife, and if the words if used in favour of

a male would convey an absolute estate, there is no presumption arising from the sex of the legatee cutting down her right.

50 All. 375 and 47 M.L.J. 723 applied.

2 M.I.A. 7 explained.

But if the donee or legatee is a wife, then the presumption is that she takes it as a limited holder without power of alienation.

Section 90 of the Evidence Act justifies a presumption being raised in favour of the disposing power of the testator.

A.S. Nos. 82 and 295 of 1924 (Phillips and Odgers, JJ.) followed.

47 All. 31 applied.

P. Satyanarayana Rao for Appellant.

K. Kameswara Rao for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1307 of 1926.
28th November, 1929.

Easements Act, S. 13 (*e*)—*Right of way—Easement of necessity—Dominant owner purchasing a property through which he can reach the dominant tenement—Right of way over servient tenement enjoyed till then as easement of necessity—If by purchase the easement of necessity ceases.*

In considering questions of easement of necessity, convenience is not the test but absolute necessity and in this matter S. 13, cl. (*e*) is the same as the law in England.

28 Mad. 495 and 4 C.L.J. 367 followed.

19 Bom. 797 dissented from.

Right of way of necessity only arises when there is no other possible legal mode of getting at the land and an easement of necessity which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi dominant tenement.

Holmes v. *Goring*, 2 Bing. 76: 130 E.R. 233 discussed.

English, Indian and American Law reviewed.

G. Lakshmanna for Appellant.

P. Somasundaram for Respondent.

S.V.V.

Kumaraswami Sastri and A.S. No. 199 of 1928.
Pakenham Walsh, JJ.
28th November, 1929.

Easements Act, Ss. 5 *and* 13, *cl.* (*e*)—*Right of way—Discontinuous easement though way claimed over a well-formed and metal road—Easement of necessity.*

In view of the definition in S. 5 of the Indian Easements Act and the terms of S. 13 (*e*) a right of way cannot be held to pass on a severance of a joint tenement, merely on the ground that up to the date of the severance, the way had for several years been used over a well-formed and metalled road. The decisions in *Alabaster* v. *Brown*, 37 Ch.D. 507, *Head* v. *Meara*, (1912) 2 I.R. 262 and *Nichols* v. *Nichols*, (1900) 81 L.T. 811 cannot be followed in this country in the face of the definition of continuous and discontinuous easements in section 5 of the Easements Act.

In construing an Indian enactment, the cases in England whether prior or subsequent cannot be allowed to control or add to the plain meaning of the statute; nor will it be right to start with the assumption that the Indian statute only intended to enact the English rule.

English and Indian cases on the point reviewed.

A right of way cannot be claimed as an easement of necessity merely on the ground that it is reasonable or convenient or that it is required to enable the parties to enjoy the property in the manner in which it was enjoyed at the time of the severance. In view of the distinction made in S. 13 between clauses (*a*) and (*d*) on the one hand and clauses (*b*), (*c*), (*e*) and (*f*) on the other, a right of way can be claimed as an easement of necessity only if without the way in question, there will be no access to the property.

S. Varadachariar, P. Somasundaram and *K. Umamaheswaran* for Appellant.

The Advocate-General (*A. Krishnaswami Aiyar*) for Respondent.

S.V.V.

Kumaraswami Sastri, J. S.A. No. 1563 of 1926.
4th December, 1929.

Evidence Act, S. 32, *cl.* (6)—*Pedigree—Carved on a stone let into a well—Admissibility—Proof of.*

Where a pedigree was carved on a big slab built into a well which looked as old as the well itself,

Held, a copy of the inscription is admissible under S. 32, cl. (6) of the Evidence Act, and falls under 'other thing on which such statements are usually made.' Under clause (6) it is not necessary to show who it was that made the statements or when.

37 All. 600 followed.

B. Somayya for Appellants.

S. Varadachariar and *S. V. Venugopalachariar* for Respondents.

S.V.V.

Curgenven, J. S.A. No. 1230 of 1926.
3rd December, 1929.

Mortgage—Prior and puisne mortgagee—Prior mortgagee's decree without impleading puisne mortgagee—Puisne mortgagee's decree—Conflict between auction-purchasers in both sales—Right to possession—First mortgage auction purchase pending second mortgagee's suit—Lis pendens—*Whether applicable.*

A first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee. After the first mortgagee's decree but before the sale, the second mortgagee also filed a suit and obtained a decree for sale. The plaintiff's predecessor-in-title purchased the properties in first mortgagee's sale and the third defendant purchased them in the second mortgagee's sale.

Held, the purchaser under the second mortgagee's sale is entitled to possession as against a purchaser under the first mortgagee's decree, as the second mortgagee was not a party to the first mortgagee's suit.

21 M.L.J. 123 (F.B.) and I.L.R. 40 Mad. 77 followed.

Also the sale under the first mortgage decree being pending the second mortgagee's suit, the first mortgagee purchaser's rights are subject to the rights obtained under the second mortgagee's decree and the auction sale thereunder.

K. Bhimasankaram for *B. Satyanarayana* for Appellant.

G. Lakshmanna for Respondent.

S.V.V.

Kumaraswami Sastri, J. S.A. No. 1538 of 1926.
4th December, 1929.

Second Appeal—Interference by High Court on a finding of fact—When allowable—C. P. Code, 1908, *S*. 100 *and O*. 42.

There is a difference between the cases where the High Court can reverse a decision of the Appellant Court on a finding of fact and where the High Court remits the case to the Lower Court asking it to deal with the facts in a way which is more satisfactory.

Where there is no evidence at all (34 All. 579) or where the *onus* is wrongly thrown (52 Mad. 83), the High Court can reverse the judgment of the Lower Court. In cases where material evidence is not considered or there is a mistake in the consideration of such evidence or where there is a misconception as to certain facts or erroneous assumptions not borne out by the record, the High Court has power to call for a revised finding directing him to go into the evidence and come to a conclusion after considering all the evidence and correcting such mistakes as the High Court points out.

N R C

Especially where it is a reversing judgment, the appellate Judge must exercise greater caution.

18 Cal. 28 (P.C.), 46 Cal. 189 (P.C.) and 57 M.L.J. 210 (P.C.) explained.

21 L.W. 227, 24 L.W. 88, A.I.R. 1928 Mad. 826 and A.I.R. 1927 Mad. 1167 followed.

B. Somayya for Appellant.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Respondent.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 945 of 1926.
4th December, 1929.

Civil Procedure Code, S. 92—Applicability to mutt heads—Matadhipathi of mutt A also matadhipathi of mutt B—Suit for scheme in respect of one mutt alone—Each mutt having separate endowments—Suit if maintainable.

Defendant, the matadhipathi of two mutts *A* and *B*, had his head office at *A* and the suit was brought to remove him from the headship of mutt *B* alone. The two mutts had separate endowments but surplus income from *B* was taken away to *A* and any deficit to *B* was met by *A*.

Held, S. 92 applies to the case of a mutt whose head should be taken to be answerable for maladministration as a trustee in a general sense though he may not be an express trustee in the English sense of the term.

50 Mad. 567 followed.

Also as mutt *B* had separate endowments of its own, the suit was maintainable to remove him from trusteeship of *B* without seeking to remove him from *A*. The trustee would not be entitled to utilise the funds of one trust for the expenses in connection with another trust.

C. S. Venkatachariar for Appellant.

T. Ramachandra Rao for Respondent.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 1339 of 1926.
5th December, 1929.

Tariff Act, S. 10—Purchase of salt—Payment of price which included the tariff duty then payable thereon—Subsequent reduction in duty with effect from before the contract date—Seller receiving the difference from the Government—Buyer, if can sue the seller to pay it over to him.

Just as under cl. (*a*) of S. 10 of the Indian Tariff Act, the seller can, in the case of an increase in the duty, sue for and recover and addition in duty, so also a purchaser who under cl. (*b*) is entitled to deduct the equivalent of the decrease of duty or remitted duty when there is a reduction in the duty to take effect from the date of contract, can sue to recover the amount paid to the seller as representing the remission on the bags of salt sold to him. It does not matter that the transaction was "closed" or "settled" between the parties, as the amount representing the remission is an amount which he was not bound to pay to the seller.

52 C. 644 (P.C.) distinguished as a case of revision of tariff value.

47 M. 222 doubted and distinguished.

C. S. Venkatachariar and *V. Rajagopala Aiyar* for Appellant.

K. V. Ramachandran for Respondent.

S.V.V.

Anantakrishna Aiyar, J. S.A. No. 1541 of 1926.
5th December, 1929.

Limitation Act, Art. 142—*Adverse possession—Forest land—Onus of proof—Second appeal—Conclusion to be drawn from proved facts—Question of law.*

Under Art. 142 of the Limitation Act, the plaintiff should file his suit within 12 years from the date of dispossession and for this purpose there is no separate rule for jungle lands. But as in the case of forest lands possession will be presumed to be with the owner, unless the trespasser rebuts it by proving positive acts of possession, the plaintiff should be taken to have been in possession until dispossession is proved by the defendant.

Case-law reviewed.

Whether the facts proved constitute adverse possession is a question of law and the High Court is bound in second appeal to examine whether the conclusions drawn by the Appellate Court from the facts proved are legally sustainable.

19 C. 253 and 21 A. 504 referred to.

K. P. Krishna Menon for Appellant.

O. T. Govindan Nambiar instructed by *Messrs. King and Partridge* and *P. S. Narayanaswami Aiyar* for Respondents.

S.V.V.

Kumaraswami Sastri and Walsh, JJ. A.S. No. 99 of 1925.
5th December, 1929.

Trust—Declaration in a prior suit that it is trust property—Obtained by the alleged trustee—Subsequent alienation by him—

A subsequent representative claiming to set aside the alienation as not binding on trust—Alienee if can plead that it is private property.

In view of the doubt felt as to whether the observations of the Judicial Committee in 34 Mad. 257 are to be taken as overruling the considered view held in 2 C.L.J. 431, the following questions have been referred to a Full Bench:—

1. When a person assuming the position of trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, has he any title to mortgage the property on the footing that it is his private property?

2. Is a subsequent alienee from him entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not trust property?

The Advocate-General and *A. Ramachandra Aiyar* for Appellants.

P. Chenchiah and *P. Venkatramana Rao* for Respondents.

S.V.V.

Curgenven, J. S.A. No. 924 of 1926.
5th December, 1929.

Hindu Law—Alienation by mother as guardian of a minor widow—Renewal by widow after attaining majority—Suit by reversioners to declare the later alienation as not binding on reversion for want of necessity—If they should also get the prior alienation by guardian declared invalid.

During the widow's minority, the mother as guardian executed a mortgage over the widow's property, which mortgage was ratified and renewed by the widow after attaining majority. The reversioners filed a suit for a declaration that the renewed mortgage was invalid.

Held, the alienation by the mother as *de facto* guardian of the widow, though not for a necessity, is only voidable and therefore can be ratified by the widow under Hindu Law. It is well settled that a *de facto* guardian can alienate for necessity and that connotes power in the *de facto* guardian to deal with the property and no distinction is drawn between the *de facto* and *de jure* guardians with regard to the powers of alienation.

49 M. 768 followed.

38 M. 1125 distinguished as *obiter* and A.I.R. 1928 M. 226 as a case of necessity.

K. Kameswara Rao for Appellant.

V. Govindarajachari for Respondent.

S.V.V.

Jackson, J. Cr.R.C. Nos. 571 and 572 of 1929.
5th December, 1929.

Criminal Procedure Code, S. 247—Case called on a date fixed for hearing—Accused present but complainant absent by mistake as to date of hearing—Acquittal recorded under S. 247—Bench of Magistrates if can re-open the order of acquittal.

A case which was entered in the registers as posted to the 1st March was called by the Bench of Magistrates hearing it on that date but as the accused alone was present and the complainant was absent, the Magistrates recorded an acquittal under S. 247. On the 5th the Magistrates set aside the acquittal and proceeded with the trial on the ground that the complainant was absent on a mistaken impression as to the date and the Bench also intended the 5th, though noted the 1st as the date of hearing.

Held, that the order of acquittal cannot be treated as a nullity and set aside by the same Magistrates who passed the order of acquittal.

42 C. 365 not approved as based on a misreading of 2 Weir 307, where the order was not set aside by the original Magistrates but by the High Court in revision. But in view of the importance of the question, the case has been referred to a Bench.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar* for Petitioner (Accused).

The Public Prosecutor for the Crown.

S.V.V.

Wallace and Anantakrishna Aiyar, JJ. S.A. No. 304 of 1926.
10th December, 1929.

Limitation Act, Arts. 132 *and* 148*—Prior and subsequent mortgages—Suit by prior mortgagee without impleading second mortgagee—Sale in execution of that decree—Subsequent suit by the second mortgagee impleading mortgagor alone—Purchase by mortgagee himself—Suit to redeem by the second mortgagee—Article applicable.*

The assignee of the interests of the second mortgagee sued to redeem the first mortgage. The defendant was the purchaser in execution sale in pursuance of the first mortgagee's decree. The second mortgagee was not a party to the first mortgagee's suit. The second mortgagee also had brought a suit on his own mortgage against the mortgagor and purchased the equity of redemption in execution. The auction purchaser was made a party but as he claimed a title paramount, he was exonerated.

Held, Art. 148 applied to the case.

47 M.L.J. 602 and 20 L.W. 620 dissented from as 14 C.W.N. 439 which is relied on in those cases has been overruled by 33 C.W.N. 1067 (F.B.) and not approved in the other High Courts also.

V. N. Venkatavaradachariar for Appellant.

V. Ganapathi Ayyar for Respondent.

S.V.V.

Wallace, J. S.A. No. 1176 of 1926.
13th December, 1929.

Estates Land Act, S. 42—Tenant to pay a rent on the basis of his enjoying a certain number of acres—Tenant actually found to be enjoying more on measurement—Suit for arrears of rent on the excess area enjoyed—If can be treated as a suit for damages for use and occupation.

A suit, not for ejectment, but as for arrears of rent due on the ground that the tenant was enjoying more extent than was agreed on and that the rent on the excess was not included in the actual rent he paid, is a suit for additional rent for land proved to be in excess of the area for which rent has been previously paid by him within the meaning of S. 42 of the Estates Land Act, 1908 and must be filed before the Collectors and cannot be treated as a suit for damages for use and occupation.

B. Jagannadha Das for Appellant.

G. Lakshmanna and *A. Venkatachalam* for Respondents.

S.V.V.

Wallace, J. S.A. No. 992 of 1925.
13th December, 1929.

Transfer of Property Act, S. 52—Lis pendens—*Auction purchaser in execution of a money decree—Debt binding on estate—Purchase pending the suit for maintenance claiming charge—Purchaser in execution of maintenance decree—If purchase in execution of money decree prevails over maintenance sale.*

The question whether the right of the auction purchaser in execution of a money decree for a debt binding on the estate prevails over the rights of the auction purchaser in execution of a decree creating a charge in favour of a maintenance holder when the execution sale under money decree is prior in date to the sale in execution of the maintenance decree but subsequent to the date of the plaint in the maintenance suit was referred to a Bench with an expression of opinion in favour of the view in 29 Mad. 508 that as the sale under the money decree is for a debt binding on the estate, it is not affected by *lis pendens.*

G. Lakshmanna for Appellant.

K. Kameswara Rao for Respondent.

S.V.V.

[END OF VOL. LVII.]